Litigating in the name of the people: Stresses and strains of the development of public interest litigation in Bangladesh

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Thesis submitted for the Degree of Doctor of Philosophy

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February 1998

Abstract

This thesis examines the development of public interest litigation (PIL) in Bangladesh from a constitutional perspective. PIL seeks to ensure accountability on the part of those in power, and socio-economic and collective justice for the general public, by giving priority of public interest over individual or special interests. Considering the socio-economic realities of Bangladesh, there is a huge potential for PIL to aid the poor, the deprived and the un-represented.

In Bangladesh, the development of PIL began to accelerate after the fall of the last autocratic regime in 1990. The Supreme Court has gradually re-interpreted the Constitution in favour of PIL. Socio-economic and collective justice principles of the Constitution, it has been declared, not only inspire but mandate a PIL approach. However, the development of PIL in Bangladesh has not been a justice-focused grass-root movement. The thesis argues that the use of PIL in Bangladesh has been dominated by an élite whose main concern continues to be the re-distribution of power in the aftermath of the autocratic rule.

We analyse the use of PIL by the élite from several perspectives. First, the conceptual and constitutional basis of PIL, as expounded by the Bangladeshi courts, emphasises people's power rather than social justice. Second, the gradual progress of PIL cases demonstrates how it has been influenced by its close connection with recent constitutional and democratic developments. Third, the development of the rules of public interest standing illustrates the negative effects of the use of PIL by the élite for their own purposes. Fourth, analysis of relevant constitutional provisions demonstrates the extent of success of the attempts by constitutional activists to re-define power-relations through PIL, raising the question whether such attempts actually benefited the general public.

The present thesis analyses the process of recognition of PIL as an integrated feature of the Bangladeshi law and argues that the use of the techniques of PIL by the élite to participate in the power-relations debate has actually undermined the much-needed focus on social and economic justice for the poor and the deprived.

Acknowledgements

Continuous support and co-operation of many individuals and institutions have enabled me to conduct research in a rapidly developing area of Bangladeshi law. Financially, this thesis was made possible by a scholarship awarded by the Commonwealth Scholarship Commission and administered by the British Council. I am thankful to these organisations.

I am deeply indebted to my supervisor, Dr WF Menski, for his inspirational support. Simple words of thanks can not express my gratitude.

I am grateful to many lawyers, judges and academics for their valuable suggestions and assistance in the collection of materials. Advocate Saifur Rashid has been a source of continuous support as he kept me in touch with the latest Bangladeshi developments. Co-operation from late Dr Mohiuddin Farooque and Advocate Rizwana Hasan of Bangladesh Environmental Lawyer's Association has been valuable. Mr Nazrul Islam has been supportive throughout the writing of the thesis and has made valuable suggestions. I am also grateful to Dr Borhan Uddin Khan for his support in the earlier stages of the research.

I would like to express my sincere thanks to Mr Abdul Malique and his family for making my stay in London an enjoyable and memorable one.

My heartiest gratitude goes to my father, Advocate Syed Ahmed, for his continuous support and encouragement. I take this opportunity to remember my late mother - this work is a result of her dreams rather than mine.

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Abbreviations

AC	Appeal Cases
AD	Appellate Division
AIR	All India Reporter
All	Allahabad
All ER	All England Law Reports
AP	Andhra Pradesh
BCR	Bangladesh Case Reports
BELA	Bangladesh Environmental Lawyers Association
BLAST	Bangladesh Legal Aid and Services Trust
BLC	Bangladesh Law Chronicles
BLD	Bangladesh Legal Decisions
BLT	Bangladesh Law Times
Cal	Calcutta
CEC	Chief Election Commissioner
Ch D	Chancery Division
CriLJ	Criminal Law Journal
Dac	Dacca
Del	Delhi
DLR	Dhaka Law Reports
FAP	Flood Action Plan
FB	Full Bench
Guj	Gujarat
HC	High Court
HCD	High Court Division
HL	House of Lords
ILR	Indian Law Reporter
J	Justice
JILI	Journal of the Indian Law Institute
JJ	Justices
KB	King's Bench
Ker	Kerala
KLT	Kerala Law Times
Lah	Lahore
LJ	Law Journal
LR	Law Reports
Mad	Madras
MP	Madhya Pradesh
Mys	Mysore
NGO	Non Governmental Organisation
P & H	Punjab and Haryana
PIL	Public interest litigation
PLD	All Pakistan Legal Decisions
PUCL	People's Union for Civil Liberties

Punj	Punjab
QB	Queen's Bench
SAL	Social Action Litigation
SC	Supreme Court
SCALE	A weekly law reporter of the Supreme Court of India
SCC	Supreme Court Cases
SCMR	Supreme Court Monthly Reports
SCR	Supreme Court Reports
Spl	Special
WLR	Weekly Law Reports
WP	Writ Petition

Chapter one: Introduction

I

When the work on the present thesis began in late 1993, Public Interest Litigation (PIL) was an obscure topic in Bangladesh. Apart from a very small number of socially conscious and motivated activists, hardly anyone appreciated its importance and potential. These activists were inspired by the advancement of social and collective justice through PIL in other jurisdictions, including India and Pakistan.[1] In fact, limited unsuccessful attempts were made to introduce PIL in Bangladesh after the fall of the autocratic regime of General Ershad in 1990.[2] But following the long period of oppressive and uninspiring autocratic rule, the legal environment was still conservative. So the judges of the Supreme Court viewed PIL from a traditional standpoint and considered the techniques of PIL too alien to be applicable to Bangladesh. The problem at the time was how to develop PIL within the Bangladeshi legal system.

However, the situation was changing rapidly. The revival of democracy was followed by significant constitutional developments including free elections and re-introduction of a parliamentary system of government. These changes re-

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[1] The inspiration came mainly from the works of the Indian social activists. For an important early essay on activism, see Baxi (1981: 31-37). Bhagwati (1984-1985: 561-577) analyses the nature of the judicial activism in India and terms it as social activism.

[2] Examples of such early attempts include State v. Deputy Commissioner, Satkhira and others 45 DLR (1993) 643; Syed Mahbub Ali and others v. Bangladesh unreported Writ Petition 4036/1992; Syed Borhan Kabir v. Bangladesh and others unreported Writ Petition 701/1993 and Rokeya Khatun v. Sub-Divisional Engineer and others unreported Writ Petition 1789/1993.

affirmed, at least at an ideological level, the supreme status of the Constitution and the place of the people as the ultimate holders of power. The spirit and scheme of the re-energised Constitution became an important source of inspiration as there was a renewed sense of possessing democratic power and a rekindled awareness of social and collective justice. The liberal atmosphere encouraged social activists, along with constitutional lawyers and political activists, to resort to the Supreme Court with public and political causes. The Court started to explore new ways to accommodate PIL under the Constitution and gradually recognised its various aspects as compatible with the Bangladeshi situation.[3] By 1996, the issue was how full recognition of PIL could be ensured.

Finally, in late 1996, the Supreme Court accorded comprehensive recognition of PIL in Dr Mohiuddin Farooque v. Bangladesh (FAP 20).[4] It was established that there is no bar for a citizen to litigate in the public interest since PIL derives its inspiration and validity directly from the Constitution of Bangladesh. From an obscure topic, PIL has thus suddenly become an important feature of the Bangladeshi law.

The main aim of the present thesis is to analyse in detail, from a constitutional perspective, this recent development of PIL in Bangladesh. The thesis examines how the Supreme Court has gradually modified its traditional

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[3] Leading cases of this genre include Bangladesh Retired Government Employees Welfare Association v. Bangladesh 46 DLR (1994) 426; Anwar Hossain Khan v. Speaker of Bangladesh Sangsad Bhavan and others 47 DLR (1995) 42 and Abu Bakar Siddique v. Justice Shahabuddin Ahmed and others 17 BLD (1997) 31.

[4] 17 BLD (1997) 1.

individualistic approach and re-interpreted the Constitution in favour of the techniques of PIL.

This re-interpretation is based, according to the Bangladeshi judges, on the aims and objectives of the Constitution, which mandates social and collective justice. PIL is supposed to help the 'common people' or the 'little man'. Promoters of PIL in Bangladesh declare that the decision makers must be accountable to the people for their actions and there must be socio-economic and collective justice for the poor and the deprived.

In reality, however, the development of PIL in Bangladesh has lacked the support of a people-oriented strong grass-root movement. The techniques of PIL were rarely used by the common man or for the purpose of the general people. The movement for PIL was dominated by a small group of lawyers, constitutional activists and judges, themselves part of the established élite, whose main concern was the re-distribution of political power in the aftermath of the autocratic rule. This was a time when the continuing process of revival of democracy and constitutionalism that started with fresh vigour since 1990 was in full swing. These constitutional developments influenced, and were influenced by, the development of PIL.

Thus in the development of PIL in Bangladesh, the main focus was not on social and economic justice but on political rights and the modalities of power-sharing between the privileged and decision makers. The concern was less about the problems of the little man and more about the rights of the privileged few. The techniques of PIL were used by the élite to further their own agenda in the

name of the people. So, rather than being a legal strategy that aims to ensure justice, PIL in Bangladesh has immediately become a political and establishment strategy. This is clearly reflected in the fact that the majority of the PIL cases in Bangladesh deals with issues of power-sharing.

We analyse the development of PIL in Bangladesh and the process of its recognition as an integrated feature of the Bangladeshi law. It is argued that the use of the techniques of PIL by the privileged few, especially to participate in the power-relations debate, has actually undermined the much-needed focus on socio-economic justice for the common people.

II

In the continuing process of progressive legal development in Bangladesh, PIL is a very important technique that affects both conceptual and practical aspects of law. PIL denotes litigation where the rights and interests of the public are concerned. It aims to ensure that those in power are accountable to the people for their actions. PIL is often regarded as a weapon to attain socio-economic justice for the backward sections of the community.[5] From another perspective, it is a method to represent the un-represented or the under-represented and provides an opportunity for

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[5] In the sub-continent, PIL is mainly seen as a weapon to ensure social justice. For an Indian definition of PIL on this line, see People's Union of Democratic Rights v. Union of India AIR 1982 SC 1473 at 1477. In Pakistan, PIL is described by MH Khan (1992: 84) as a task of the eradication of social evils through the medium of law.

common people to participate in the decision making processes relating to public issues.[6]

In PIL cases, the interest of the public is given priority over special interests, the court being ready to disregard the rules of the adversary model of litigation. It involves a public law approach with respect to the rules of standing, procedure and implementation so that private citizens can advance public aims through the courts.

Developments of PIL have taken, to some extent, independent and separate routes in different jurisdictions. In other words, PIL has travelled through jurisdictions. It first successfully emerged in the USA in the 1960s and 1970s and subsequently influenced historically associated jurisdictions including England and Australia to various degrees.[7] In the early 1980s, it developed in India.[8] This was soon followed by Pakistan.[9]

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[6] In the western jurisdictions including the USA, 'public interest law' is mainly seen as the representation of the unrepresented in the society. It consists of the use of litigation and public advocacy, i.e. lobbying by representation or publication, to advance the cause of the minority or disadvantaged groups, individuals or the entire society; see Cooper and Dhavan (1986: 5). See also Cooper (1991: 5-11) for a series of extracts illustrating the meaning of the term.

[7] For the development and general account of public interest law in the USA, see Council for Public Interest Law (1976), Weisbrod et al. (1978) and Aron (1989). For the situation in the UK, see Cooper and Dhavan (1986) and Justice/Public Law Project (1996). For an account of public interest law in Australia, see Roddewig (1978) and Australian Law Commission Report (1985).

[8] Baxi (1985a) gives an authoritative early account of PIL in India. In the Annual Survey of Indian Law, Prakash (1984: 324-332) and Parmanand Singh (1985b, 1986b, 1987-1993) provide a continuing appraisal of the development of PIL. For more recent assessment, see Peiris (1991), Vish (1995), and Janata Dal v. HS Chowdhary AIR 1993 SC 893 at 908.

[9] MH Khan (1993) provides the most comprehensive work on the Pakistani development. See also Faqir Hussain (1993) and SM Hussain (1994).

However, situations and circumstances differ in various jurisdictions as well as the constitutional schemes.[10] The result is that PIL from one country can not be blindly copied to another. Attempts to import US-style public interest law in England failed while developments in Australia and Canada have followed their own patterns.[11] Similar observations have been made while comparing the American PIL with the sub-continental one.[12] Even the Indian and Pakistani versions of PIL are clearly not the same.[13]

It follows that any examination of the development of PIL in Bangladesh must take into account the particular Bangladeshi situations and circumstances. To understand PIL in its Bangladeshi context, we need to consider the background of the Bangladeshi legal system, the interaction of PIL with the continuing constitutional developments that started after 1990 and the objectives and scheme of the Constitution itself.

As to the background of the legal system, it must be taken into account that it is an inheritance from the British colonial period, although in practice it has

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[10] See Feldman (1992: 44-72) for a discussion on PIL and constitutional theory in a comparative perspective.

[11] Harlow (1986: 91) argues that attempts to import US-style PIL without considering the local situation of England is an important cause of the disillusion experienced by many of its keenest advocates.

[12] Cunningham (1987: 494-523) provides a comparative analysis of the American and Indian PIL. Even at the initial stage of PIL in India, Baxi (1985a: 290) cautioned that blind imitation will destroy the movement for PIL if the 'vital political cultural differences' between the USA and Indian societies are ignored.

[13] MH Khan (1993: 29-59).

both indigenous and foreign elements.[14] This explains why Bangladesh is apt to be influenced by Britain and its former colonies with respect to legal development. Especially, there is much in common among India, Pakistan and Bangladesh, all third world South Asian countries, with respect to culture, economy, politics and society. The common legal background means that as regards principles and practices of law, they have many identical elements so that the experience of legal development in one country can be used by another. The influence of the Indian and Pakistani developments on the progress of PIL in Bangladesh is thus not an isolated event but part of a continuing process of sharing of ideas and techniques among these jurisdictions.

As regards the continuing constitutional development, there are a number of issues which require detailed analysis. What was the legal situation as regards PIL after the adoption of the Constitution in 1972? What were the factors that prevented development of PIL prior to the resignation of the autocratic regime in 1990? What were the effects of the constitutional developments after 1990 on the progress of PIL? In fact, the process of revival of democracy and constitutionalism has dominated the minds of the lawyers, constitutional activists and judges at the time when PIL was promoted. They focused not so much on issues of basic socio-economic justice, as on the problems of participation in the political process.

Whatever was the motive, one can not litigate in the name of the people unless it is endorsed by the Constitution. In fact, as to the particular Bangladeshi

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[14] In a recent doctoral thesis, Malik (1994) has demonstrated the 'unlocality' of the laws made by the colonial government in British India.

situations and circumstances, we argue that the most important factor in the development of PIL is the Constitution. Bangladesh adopted a modern Constitution in 1972 which emphasises social and collective justice principles and operates as the supreme law of the land.[15] The Constitution provides for writ jurisdiction under Article 102, which enables private citizens to petition the Supreme Court for public aims. The development of PIL in Bangladesh has been, as elsewhere in South Asia, focused on the writ jurisdiction of the Supreme Court.

Since PIL in Bangladesh is principally a constitutional phenomenon so far, the present study confines itself to constitutional litigation in the Supreme Court.[16] This narrows down the scope of the thesis in two ways. First, unless directly relevant, rules and principles of civil and criminal laws including cases and statutes are not dealt with.[17] Second, the focus is on liligation only and no attempt has been made to explore various other strategies of 'public interest law'. Thus lobbying, formation of public opinion etc., included within the meaning of 'public interest law' as defined in the USA and in India, are not our concern.[18]

An analysis of the development of PIL in Bangladesh so far requires detailed consideration of the aims, objectives, structure and scheme of the Constitution. This

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[15] For a history of constitutional development in Bangladesh, see Dilara Choudhury (1995) and Moudud Ahmed (1992).

[16] The situation may be contrasted with India where PIL has revolutionised and virtually created whole new areas of law including environmental and consumer protection law. See Ahuja (1997).

[17] PIL-related legal provisions in laws other than the Constitution are not within the scope of the present thesis and thus have not been included. Mahmudur Rahman (1992: 1-7 and 1997: 79-86) critically discussed a number of such statutes.

[18] For an example of these strategies in the Indian context, see Gurjeet Singh (1996).

raises a number of questions. Is the Bangladeshi brand of constitutionalism compatible with the socio-economic and collective justice approach of PIL? In what ways does the Supreme Court interpret the underlying constitutional principles in favour of PIL? Is the constitutional support for a social and collective justice approach sufficient for its continued success? How have the courts interpreted this power to accept petitions and issue writs in PIL cases?

While the high and lofty constitutional principles supporting social and collective justice were expounded in favour of PIL, the apparent aim was to serve the interests of the common man. In light of our arguments, this thesis needs to analyse to what extent the general people, as opposed to the privileged few, have been benefited. This involves several issues. The persons who promoted PIL are the lawyers, judges and constitutional activists. To what extent have they represented the interests of the common people? What are their respective contributions and what are the types of cases they brought?

PIL cases have resulted in the re-interpretation of specific provisions of the Constitution. These include rules of standing and respective jurisdictions of governmental departments. The thesis analyses the extent to which these re-interpretations have been influenced by cases that dealt with the interests of the élite rather than those of the general people. We need to examine in detail, therefore, how and to what extent the élite were able to use PIL to further their own agenda in the prevailing power struggle.

III

Chapter 2 of the present thesis examines and analyses the conceptual and constitutional background of PIL. The discussion begins with an outline of the western and sub-continental ideas, concepts and theories relating to PIL along with their constitutional relevance. While the focus in the West is on the assertion of collective rights, the activists in the sub-continent emphasise social justice as envisaged by the constitutions of India and Pakistan. But the social justice of the Indian Constitution is of a secular nature, while in Pakistan its content is Islamic.

We need to explore why, under the Bangladeshi constitutional scheme, neither the Indian nor the Pakistani version could be followed without qualification. Bangladeshi judges emphasised ultimately the distinct and unique nature of the country's Constitution on the basis of its autochthony. This autochthonous nature of the Constitution is regarded as a basis that empowers the people to assert their constitutional rights. The primary focus is not on social justice but on the power of the people to assert their political authority.

The gradual evolution of the issues, cases and activities relating to PIL in Bangladesh has been explored in chapter 3. Since the independence of Bangladesh, followed by the adoption of the Constitution, there has always been a weak but steady flow of judgements encouraging a social and collective justice approach. But mainly due to autocratic rules and martial laws, creative or progressive interpretation of the Constitution was prevented for a long time.

The third chapter draws on this background to explain why PIL did not develop before the fall of the last autocratic regime in 1990. When PIL started to develop, the revival of democracy and constitutionalism was the focus of attention in Bangladesh. Our analysis illustrates how and to what extent these particular political and constitutional developments led the élite to use PIL in furtherance of their political strategy.

We analyse the progress of PIL from several perspectives. First, we examine the types of cases filed in the name of PIL to determine to what extent they advance genuine social and collective justice issues as distinct from political aims. Second, we analyse the extent to which PIL in Bangladesh has been a collective effort of activist individuals, lawyers, judges and voluntary sector organisations to evaluate their respective contributions. Third, we explore the close relation between the ongoing constitutional developments and the number and type of PIL cases pleaded before the court.

Chapter 4 analyses the problem of standing of PIL petitioners in its Bangladeshi context. Article 102 of the Constitution enables the people to have direct access to the Supreme Court through constitutional writs. Traditionally, the petitioner was required to be personally aggrieved. This was an inherited principle which created a threshold problem for PIL. The traditional legal position has been gradually modified to allow PIL in Bangladesh.

Our analysis includes cases where misuse of PIL by the élite resulted in the denial of standing and actually hindered the progress of PIL in its earlier stage. We also examine the effects, in the later stage of the development of PIL,

of élite-led cases on the rules of public interest standing which have been ultimately adopted by the Court.

Chapter 5 examines, by analysing specific constitutional provisions, the efforts by the élite to use PIL to influence the arrangement of power-relationship among governmental organs. This demonstrates and confirms the preoccupation of the Bangladeshi lawyers and constitutional activists with the concerns of the privileged rather than those of the common people.

PIL petitioners, while challenging the jurisdictional boundaries that separate the areas of the various organs of the government, rely upon the doctrine of 'separation of powers'. This doctrine has been recognised by the Constitution and it is the duty of the Supreme Court, as constitutional interpreter, to define and protect the power-separation scheme. However, this provides an opportunity for the political activists to raise political issues for judicial consideration in the guise of public interest. As a result, our analysis demonstrates, despite the Court's attempts to project a neutral image, the influence of the continuing power struggle in the national politics is often reflected in its actions and decisions relating to PIL cases.

The chapter also examines PIL cases relating to the law making power of the parliament and its privileges. The discussion illustrates that statutes and constitutional amendments have rarely been challenged by the PIL petitioners on the ground of social or economic welfare of the people. The majority of the PIL cases have attempted to curb the domain of the executive. In some cases, the court was asked to define the meaning of the term 'state' to determine where the

public domain ends and the private sphere begins. We examine whether social and economic justice considerations of PIL have expanded that definition resulting in more areas being amenable under the writ jurisdiction. PIL has also been used with the aim to restrict executive encroachment upon the judicial arena, especially in relation to appointment, promotion and transfer of acting and retired judges. Finally, we examine to what extent the judiciary is, in its turn, encroaching upon the province of the executive with regard to implementation of PIL decisions. The chapter illustrates that the attempts by political and constitutional activists involving power-sharing issues have achieved very limited success and there has been little or no benefit for the common people.

In chapter 6, our concluding analysis critically examines the findings of each chapter with the object of identifying the stresses and strains of the development of PIL in Bangladesh. We focus on the argument that the development of PIL in Bangladesh has been dominated from the very beginning by the élite. They used the techniques of PIL to further their own agenda, especially to participate in the power-relations debate. As a result the development and use of PIL for genuine social and collective justice issues have been seriously impaired. After analysing the current trends, our discussion also indicates the future of the development of PIL in Bangladesh.

Chapter 2
Conceptual issues and constitutional basis of PIL

The present chapter discusses the background of PIL in the light of the developments of relevant ideas, concepts and assumptions that furnish its moral justifications and inspire and motivate its promoters. It analyses how PIL has drawn its legal basis, validity and inspiration from the constitutions of India and Pakistan and compares this with the Bangladeshi situation. Our aim is to explore the development of the general rules of interpretation of the Constitution that are applicable in Bangladesh when public interest is concerned.

The development of PIL in Bangladesh has been greatly influenced by its earlier developments in other jurisdictions. The first part of the chapter begins with a discussion of some of the ideas, theories and concepts of PIL, as they have been advanced in the West, especially in the USA. This is followed by an outline of the Indian and Pakistani situations where the developments of PIL owe much to the social consciousness of activist judges and lawyers. We explore how this social consciousness was translated into action to develop PIL in harmony with the constitutional provisions.

Finally, we analyse in detail the ways in which the conceptual aspects of PIL found their basis in the context of the Bangladeshi Constitution. We examine relevant constitutional provisions that support a social and collective justice approach. This social justice bias is analysed in the light of its actual role in influencing the judges and lawyers. We argue that the Bangladeshi judges are less

inclined to depend on a social justice approach in comparison with their Indian or Pakistani counterparts. In Bangladesh, the judges advanced the so called 'people's power' theory which is based on the autochthonic nature of the Constitution. They emphasise on the fact that the people hold the real political power and as such the Constitution must be interpreted in favour of the collective interest of the people. The primary focus is thus not on social justice for the poor, but on the paramount place of the people in the power sharing scheme. This conceptual approach has, in practice, influenced all aspects of the development of PIL either directly or indirectly.

2.1 PIL in the USA and other western jurisdictions: Some relevant ideas and theories

In the USA, 'public interest law' is said to be the outgrowth of diverse efforts stretching deep into American legal history to secure legal representation for the powerless and disenfranchised.[1] The legal aid movement of the 1800s, efforts of the Progressive era reformers, the civil liberties activism of the American Civil Liberties Union in the early 1900s and the Watershed civil rights cases of the 1950s are some of the roots of public interest law.[2] Finally in the 1960s and 1970s, many social movements emerged which dealt with civil rights, poverty, social injustice, hazards

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[1] For the development and general account of public interest law in the USA, see Council for Public Interest Law (1976), Weisbrod et al. (1978) and Aron (1989).

[2] Aron (1989: 6) points out that although the term 'public interest law' was coined no more than two decades ago, it is not a new phenomenon and owes its patterns of organisation, modes of financing and choices of strategies to the earlier movements.

of modern technologies and so on. In the advanced industrial capitalistic society of the USA, PIL mainly represented interests without groups such as consumerism, environment and so on. Private foundations, the federal government, private bars and law schools worked hand in hand.[3]

But with success came controversy and sceptics worried whether any real change is possible through public interest law.[4] In the 1980s, the political pendulum swang to the right.[5] The overall situation in the American society changed - instead of social advancement approach, individualism gained prominence. Campaigns against public interest law started gaining momentum and at the same time the government and a number of major organisations started withdrawing huge amounts of funds. The results of these changes are perceived by many as a failure or at least a shrinking of public interest law in America.[6] But perhaps these perceptions of failure have been due to too many expectations. The fact remains that public interest law has brought profound changes in the American legal system which have definitely come to stay.

The American development influenced historically associated jurisdictions

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[3] See in detail *Ibid.* at 10-14.

[4] For example, Kessler (1987) argues that publicly funded legal services are unlikely vehicle for the promotion of social reform and wealth redistribution in favour of the poor.

[5] Aron (1989: 14-21). It is observed that the political philosophy of the Reagan administration called for a drastic reduction in the domestic role of the federal government. Public interest lawyering was seen as incompatible with this aim.

[6] For example, Ariola and Wolinsky (1983: 1207-1227) argued that the attempts to secure relief for public interest clients often involve legal victories, only to have real relief elude them.

including England, Australia and Canada to various degrees.[7] But the growth of PIL in these jurisdictions was either partial or restricted, nothing that can be compared with the American experience of PIL materialised.

PIL is generally considered by the Western writers as a reflection in the field of law of the emerging, growing and lasting need of modern societies. In this line, in 1978, Cappelletti advanced the so-called 'massification theory'.[8] He used comparative analysis and assumed that some basic socio-economic and political needs are shared by all advanced societies and on this premise he examined the legal answers given to those common needs.

According to Cappelletti, our contemporary society or more ambitiously, our civilisation, may be characterised as a mass-production mass-consumption civilisation. But this massification extends far beyond the economic sector and embraces all spheres of our lives in society including the field of law. Cappelletti says:

> More and more frequently, because of the "massification" phenomena, human actions and relationships assume a collective, rather than a merely individual character; they refer to groups, categories and classes of people, rather than to one or a few individuals alone. Even basic rights and duties are no longer exclusively the individual rights and duties of the 18th or 19th century declarations of human rights inspired by natural law concepts, but rather meta-individual, collective, "social" rights and duties of associations, communities and classes. This is not to say that individual rights no longer have a vital place in our societies; rather, it is to suggest that these rights are practically

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[7] For the situation in England, see Cooper and Dhavan (1986) and Justice/Public Law Project (1996). For an account of public interest law in Australia, see Roddewig (1978) and Australian Law Commission Report (1985).

[8] Cappelletti (1978-79: 513 564). This essay is an adapted version of an earlier lecture, see Cappelletti (1976: 643-690). He has carefully revised this essay from time to time to take into account continuous developments. For a recent republication of an edited version, see Cappelletti (1989: 268-308).

> meaningless in today's setting unless accompanied by the social rights necessary to make them effective and really accessible to all.[9]

Cappelletti says that the complexity of modern societies generates situations in which a single action can be beneficial or prejudicial to a large number of people. This makes the traditional scheme of litigation as a two party affair quite inadequate because an individual alone is unable to protect himself efficiently in these cases. His interest is either too small, so that a legal action would not pay, or too diffuse, so that his rights are denied by the court or he may even be unaware of his rights. To protect his new social, collective and diffuse rights, therefore, it is necessary to abandon the individualistic traditional approach. New social, collective, diffuse remedies and procedures are required. The quest for these new remedies and procedures is responsible, among other things, for the development of public interest law.

Cappelletti's theory is not jurisdiction-specific. The use of the term 'modern societies' is somewhat vague and does not take into account the historical, economic and social differences between western and third world countries. But his description of the massification phenomenon provided justification for the work of PIL promoters everywhere, including the activists and judges of the sub-continent.[10]

If the focus is on the Western jurisdictions, emergence of public interest law can be found closely connected with the development of the conceptions of

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[9] Cappelletti (1978: 518).

[10] Sub-continental writers and judges were well aware of Cappelletti's arguments; see below chapter 2.2.1.

'rights'.[11] Contemporary notions are said to be dominated by a package of rights produced in the eighteenth and nineteenth centuries.[12] Consistent with the expectations of an evolving capitalist society, this classical liberal package concentrated on the rights to life, liberty and property which were considered as 'preferred' freedoms. It had two uneasy addenda, rights to equality and rights to process - uneasy because if implemented stringently, they tended to violate the *status quo* of the capitalistic society.[13]

This liberal package in effect ignored the problems faced by the poor, the disadvantaged and minorities. Similarly, it was not concerned with the diffused or community rights. But as such needs of society gradually became too great to ignore, the poor and the disadvantaged were given a number of new rights. According to Dhavan and Partington, these are specific legal entitlements and were not treated as preferred rights.[14] They were regarded as politically negotiable and easily alterable entitlements doled out by a welfare state.

These new rights include social welfare rights, social justice rights and civil and political rights. Social welfare rights, at the individual level, consist of specific welfare entitlements such as right to social security, housing etc. At the collective level, it includes diffused interests such as those of consumers or environmental issues. Social justice rights aim to give more shape and substance

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[11] Cooper (1991: 14), while providing a select biblopgraphy on this issue, observes that the relationship between rights theory and public interest law is covert rather than explicit.

[12] Dhavan and Partington (1986: 236).

[13] *Id.*

[14] *Ibid.* at 237.

to social aspects of the right to equality. Instead of formal equality a new and complex social justice jurisprudence aims to provide substantial and real equality. Civil rights are concerned with the manner in which people are treated in a civil society and the circumstances under which people can be deprived of their freedom while political rights deal with the important aspects of democratic participation in public life such as rights to fair elections.[15]

These new rights involve a number of new challenges. As they relate to very complex social issues, the traditional system of law found it very difficult to recognise and define these rights in order to make them available to those who are entitled to them. This challenge had to be answered by searching for ways how they can be articulated, processed and obtained. Public interest law, observe Dhavan and Partington, is thus a consequence of the new rights attained by Western societies during this century.[16]

Assertion of rights as the basis of public interest activities is nowhere more apparent than in the USA where the so-called 'classic' ideology of public interest law approach mainly dealt with the participation of unorganised interests. The focal point is civil justice, or as recast by Trubek and Trubek, civic justice.[17] Civic justice, according to them, means a full opportunity for all citizens to participate in the life of the commonwealth. They say:

> This approach was based on a critique of the American political system. The critique took as a given that it was essential to provide greater protection to the rights of citizens in their roles as consumers,

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[15] *Id.*

[16] *Ibid.* at 240.

[17] Trubek and Trubek (1981: 119-144).

> and users of the environment, and to categories like children, women, etc. It concluded that the operation of the American system of "pluralist" bargaining hampered, rather than helped, the effort to protect these interests. Pluralism was supposed to ensure democracy, but it did not. While pluralist politics worked well for organised groups, who could bargain with each other and with government for rights and privileges, it worked against such unorganised interests which were excluded from a decision-making process open only to people who could speak for organised constituencies.[18]

This problem was sought to be solved by reforming the legal system and by giving equal access to the unorganised. Access meant legal representation; public interest law became a device for ensuring equal access. This approach thus assumed that if unorganised groups were properly represented, their due rights and privileges could be safeguarded, it was seen as a matter of equalising the resources available to organised and unorganised groups.

This 'classic' approach however gave away to a more rational understanding of public interest law. Out of proportion reliance on litigation and legal advocacy was required to be replaced by a more sensible view of promoting other types of public interest activity and combining all the strategies together. Trubek and Trubek proposed that only such a wider strategy can ensure significant progress towards civic justice.[19]

Public interest law in the USA has also been analysed from an economist's standpoint by Weisbrod and others in 1978.[20] They discussed pursuit of the

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[18] *Ibid.* at 122.

[19] Trubek and Trubek (1981: 144) sum up the elements of such a strategy. For further elaboration, see Trubek and Trubek (1980).

[20] Weisbrod *et al.* (1978: 2) declared at the very beginning that the conceptual framework of the analysis was fundamentally that of an economist. But this economic perspective was a broad one encompassing a wide range of social goals.

public interest in terms of efficiency and equity. Accordingly, public interest includes the pursuit of greater efficiency in the allocation of resources among alternative uses and greater equity in individuals' access to the fruits of the socio-economic system's activities. The study also assumes that there are likely to be both efficiency and equity failures in the private market and suggested that the government, which is expected to correct such failures, is not always able to do so.[21] Failures in the governmental sector might give rise to a need for a voluntary sector, including public interest law activities. Thus, Weisbrod says:

> '. . . the voluntary sector is not unique in its role, but rather is part of an interdependent system which determines the location of resources and the distribution of incomes and opportunities'.[22]

The importance of Weisbrod's explanation lies in the fact that he gives an economist's explanation with the emphasis that litigation alone without any consideration of the economic forces at work can not bring the desired success.

While outlining above the various theoretical positions, we do not attempt to be comprehensive. But our discussion clearly indicates that public interest law enables the citizens to take part in the decision making process of the government, especially when it involves their social and economic concerns. In this process, litigation is a very important element even though it has its limitations.[23] Litigation often serves its purpose indirectly and may be seen as a part of a greater strategy of the litigant.[24]

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[21] *Ibid.* at 19.

[22] *Ibid.* at 26.

[23] See for example Galanter (1976: 929-951), and Scheingold (1989: 73-91).

[24] See for example, Denvir (1975-76: 113-1160).

2.2 The conceptual and constitutional basis of PIL according to Indian judges and writers

In the sub-continent, the pioneering work on PIL has been done in India.[25] PIL began to develop, in the post-emergency period of the late 1970s, when the Supreme Court began to demonstrate a greater awareness for social justice. A considerable number of cases advanced PIL through its infancy while activist volunteers, lawyers and especially judges, including Justices Krishna Iyer and Bhagwati, passionately promoted the techniques of PIL.[26] It has been said that the Indian PIL is primarily judge-led and even judge-induced.[27] The leading case was decided in 1982 when the Supreme Court gave a comprehensive exposition in SP Gupta v. President of India (Judges' Transfer).[28]

2.2.1 Indian social justice approach

It has been suggested that the judges and scholars pioneering PIL in India were influenced and inspired by the conceptual thinking of the Western writers.[29]

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[25] Baxi (1985a: 289-315) gives an authoritative early account of PIL in India. In the Annual Survey of Indian Law, Prakash (1984) and Parmanand Singh (1985b, 1986b, 1987-1993) provide a continuing appraisal of the development of PIL. For more recent assessment, see Peiris (1991: 66-90), Priya (1995: 81-94), and Janata Dal v. HS Chowdhary AIR 1993 SC 893 at 908.

[26] Cases that played a vital part in the development of PIL include, among others, Mumbai Kamgar Sabha v. Abdulvai AIR 1976 SC 1455; Ratlam Municipality v. Vardhi Chand AIR 1980 SC 1622; Sunil Batra II v. Delhi Administration AIR 1980 SC 1579 and Fertilizer Corporation Kamgar Union v. Union of India AIR 1981 SC 344.

[27] Baxi (1985a: 291).

[28] AIR 1982 SC 149.

[29] To Agrawala (1985: 8) it was obvious that the inspiration for PIL has come from

Bhagwati J cited Cappelletti in the Judges' Transfer case[30] and favourably discussed his ideas in a subsequent article.[31] Western scholars including Cappelletti were discussed by other Indian writers as well, but this generally happened when the concept of PIL had already been introduced and accepted in India.[32]

Perhaps the most important factor that prompted the Indian judges to act was a strong sense of social consciousness. By the early 1980s, even after more than three decades of independence, India was still an underdeveloped and poor third world country with millions of people barely surviving in abject poverty. The state not only failed to ameliorate the conditions of the poor, it faltered to incorporate substantial distributive or social justice for the masses. The legislature was seen as insensitive to the cause of the poor and a forum for politicians who were desperate to fulfil their personal ambitions.[33] The executive also failed to meet the expectations of the people and there were widespread governmental inefficiency, mistakes and lawlessness.

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the American experience. Cunningham (1987: 496) suggests that the Indian PIL has possibly drawn some inspiration from a seminal article by Cappelletti (1978-1979: 513-564). For a general discussion of the impact of Western scholarship on Indian law, see Dhavan (1985: 505-526).

[30] Above note 28 at 192.

[31] Bhagwati (1987: 21). However, he claims not only to be familiar with the American developments but also proceeds to distinguish it from the Indian PIL, see Bhagwati (1984-85: 569 and 1987: 22).

[32] For example see Parmanand Singh (1988: 124) who borrows Chayes' ideas of PIL and applies them in the Indian context.

[33] Mukhoty (1985) made an assessment of the legislature's attempts to pass legislation for the poor and concluded that generally, the attempts did not succeed mainly due to bad implementation.

The situation became all the more precarious during the emergency period of 1975-77. On the one hand, the democratic institutions were under pressure and the judiciary became increasingly subordinate to the executive and the legislature. On the other hand, it was a populist period led by Indira Gandhi when many judges, including justices Krishna Iyer and Bhagwati, became part of a nation-wide movement for legal services and thus became 'people-prone'.[34] In the immediate aftermath of the emergency, the perception of failure of the governmental branches to solve socio-economic problems was amplified as it was shared and projected by the free press.[35] Finding no other alternative, a number of conscious citizens, non-governmental organisations and social action groups started knocking at the door of the judiciary for remedy.[36] The result was judicial activism, related to so called 'judicial populism', which may be understood as a part of the court's effort to retrieve a degree of legitimacy following the emergency period.[37]

There are numerous examples demonstrating the judicial concern as to the role of the judges to alleviate the sufferings of the people. One passionate expression

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[34] These judges organised legal aid camps in distant villages, attempted to provide de-professionalised justice through camps and people's courts and called for a total restructuring of the legal system; see Baxi (1985a: 293).

[35] See Baxi (1985a: 294) for the important role played by the press in the development of PIL.

[36] Rubin (1987: 371-392) provides a detailed discussion on the civil liberties movement in India in the aftermath of the emergency period.

[37] The role of judicial populism in the development of PIL in India has been strongly emphasised by Baxi (1985a: 290). See also Cassels (1989: 510) who supports Baxi's arguments. Earlier, Baxi (1980) has discussed the issue of judicial populism in more detail and appreciated the fact that the Indian judges were moving in a more populist direction.

can be found in a much important earler case where Dwivedi J said:

> The Constitution is not intended to be the arena of legal quibbling for men with long purses. It is made for the common people. It should generally be so construed as that they can understand and appreciate it. The more they understand it the more they love it and the more they prize it..[38]

This sympathy for the downtrodden and poor was shared by a number of Suprme Court judges including the pioneers of PIL. Thus for example, Bhagwati J said:

> Large population are today living a sub-human existence in conditions of abject poverty; utter grinding poverty has broken their back and snapped their moral fibre.[39]

As a result of such concern for the poor and helpless, the judges turned to activism and elaborated the reasons why such activism was needed. Krishna Iyer's reasoning is dramatically expressed in the following passage:

> When a system keeps millions in sub-human status and millionaires in super-human control, practises inglorious grandeur and unconscionable brutality, and jaundiced justice, when a nation becomes submissive or communal-feudal-medieval and kilkenney-cat political unmindful of the masses, and the classes chase pleasure, position and shameless wealth, silence is a sin and dissent a duty . . . The explosive syndrome or passivist pathology are grave risks to our Secular Socialist Republic. Then the therapeutic process of activist protest and functional dissent finds its finest hour of fulfilment. *The day After* is too late. Now, Now.[40]

He forcefully argued that in the competition between the courts and the streets as dispenser of justice, the rule of law must win the aggrieved person for the law

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[38] Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225 at 947. In the same case (at 968), Chandrachud J cautioned not to defeat the hopes and aspirations of the 'teeming millions - half-clad, half-starved, half-educated'.

[39] People's Union for Democratic Rights v. Union of India AIR 1982 SC 1473 at 1477.

[40] Iyer (1985: 331), in this case, is a bit verbose, but such passionate sincerity is perhaps a necessary element for successful activism.

court and wean him from the lawless street.[41] Bhagwati J justified his activism in the Judges' case, saying that the rule of law will be substantially impaired if the court fails to secure fundamental rights to the poor people.[42] If the breach of public duties was allowed to go unredressed by the courts, it would promote disrespect for the rule of law.[43] It will also lead to corruption, encourage inefficiency and might create possibilities of the political machinery itself becoming a participant in the misuse or abuse of power. He also argued that in the modern welfare state individual rights and duties are being replaced by collective rights and duties of classes or groups of persons where every member of the public should have standing to challenge the action, otherwise the injury would go unredressed.[44]

Bhagwati J claimed it to be necessary to go beyond technical and juristic activism to inquire about the purpose for which such activism is practised.[45] Even when the judge adheres to formal notions of justice and claims not to be concerned with the social consequences of what he decides, it is often a thin disguise, for in many such cases his instrumental objective is to preserve the *status quo*. Bhagwati's purpose for such activism is made clear when he says:

> We in India are trying to move away from formalism and to use juristic activism for achieving distributive justice or, as we in India are accustomed to labelling it, "social justice" . . . I would call this

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[41] See already Fertilizer Corporation Kamgar Union v. Union of India (1981) 1 SCC 568 at 584.

[42] SP Gupta above note 28 at 189.

[43] *Ibid.* at 191.

[44] *Ibid.* at 192.

[45] Bhagwati (1984-1985: 564-565).

> appropriately "social activism"- activism which is directed towards achievement of social justice . . . The modern judiciary can't afford to hide behind notions of legal justice and plead incapacity when social justice issues are addressed to it. This challenge is an important one, not just because judges owe a duty to do justice with a view to creating and moulding a just society, but because a modern judiciary can no longer obtain social and political legitimacy without making a substantial contribution to issues of social justice. [46]

The social activism advocated by the Indian judges proceeded with the assumption that judges are law makers, insisting that the traditional view that they merely interpret the law is fundamentally wrong.[47] Baxi observed that while the elaboration of certain values in the Constitution assists the process of legitimisation of the ruling élite, at the same time, it tends to expose them to new demands and fresh challenges to their legitimacy.[48] The scope for judicial law-making widens when the legislature and the executive fail to perform their socio-economic functions. He further said:

> In other words, an activist judge will consider herself perfectly justified in resorting to lawmaking power when the legislature just doesn't bother to legislate. . . . in almost all countries of the Third World such judicial initiatives are both necessary and desirable.[49]

This brings us to a number of important issues relating to the political aspects of PIL. First, the activists and judges emphasised on the political role of

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[46] *Id.*

[47] Baxi (1987: 168) claims that one does not attain jurisprudencial adulthood unless one accepts that judges are law makers. For details of Bhagwati's argument on this point, see Bhagwati (1984-1985: 562-563). Prasad (1980) shows that even in the pre-PIL period, the Indian Supreme Court has created not only ordinary law but also constitutional law in the course of the exercise of its interpretative powers.

[48] Baxi (1987: 173).

[49] *Id.*

the judiciary complaining that this role has often been ignored or misunderstood. Thus, for example, Bhagwati J said:

> . . . every constitutional question concerns the allocation and exercise of governmental power and no constitutional question can, therefore, fail to be political.[50]

Similarly Baxi, arguing that the Indian judges had started to confront the socio-political realities with renewed vigour in the aftermath of the Emergency, said:

> I believe it is time to take stock and to say what the judges regard as unsayable: that the Supreme Court is a centre of political power.[51]

This political power is not affected by the doctrine of separation of powers recognised by the constitutions of the sub-continent. In fact, the doctrine enhances this power indirectly because the Constitution declares that the Court is the ultimate interpreter of constitutional issues.[52]

Second, once this political role is recognised, it is argued that this has been reflected in PIL cases, although the courts are often reluctant to articulate their role.[53] From the court's viewpoint, political activism is the inevitable result of the intensive judicial scrutiny of governmental action and non-action. From the viewpoint of the PIL petitioners, it is an alternative strategy to effect socio-economic and political transformation from outside the conventional political arena.

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[50] State of Rajasthan v. Union of India AIR 1977 SC 1361.

[51] Baxi (1980: 5).

[52] See chapter 5.1 for further discussion.

[53] For example, see Gomez (1993: 74-110) who analyses in great detail the relation between PIL and political action. It is argued that PIL is a political phenomenon and has blurred the distinction between the political and judicial landscapes.

Third, the aims and objects of the judges are not to deny their political role or escape responsibility, but to use PIL for genuine public interest causes, including the socio-economic interest of the poor and the deprived, as opposed to the purposes of the privileged and the élite. Since there is no clear dividing line between these two types of interests, it is often difficult for the judges, considering their political role, to ensure social justice. Thus in the Indian context, it has been observed that the use of PIL has often been dominated by the rich and powerful for their political or other purposes.[54]

Another aspect of the the Indian development of PIL is the demand by the judges to deviate from the traditional approaches based on the so called 'colonial Anglo-Saxon' jurisprudence. A strong criticism of the law in practice thus followed. The judges regretted that even after decades of independence, the Indian judicial system had followed the path of the Anglo-Saxon legacy left behind by the British which was framed by a colonial ruling government to suit its class interests and had little relevance to the prevalent Indian social conditions.[55] Bhagwati J explains:

> Anglo-Saxon law is transactional, highly individualistic, concerned with an atomistic justice incapable of responding to the claims and demands of collectivity, and resistant to change. Such law was developed and has evolved in an essentially individualistic society to deal with situations involving the private right/duty pattern. It cannot possibly meet the challenge raised by these new concerns for the social

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[54] For example, see Parmanand Sing (1986a: 336-347), Gomez (1993: 74-110) and Ahuja (1996: 330-347).

[55] Baxi (1991) opposes the idea of a single universal theory of judicial process as impractical and elaborates on the conflicting conceptions of legal cultures and conflicts of legal cultures.

rights and collective claims of the underprivileged.[56]

Pathak J noted that an insistence to administer the adversarial Anglo-Saxon law in a political culture that highlights the mutual responsibilities of citizens in a situation of vast differences in wealth, status and literacy can not be justified.[57] New techniques were thus sought for, it was felt necessary to evolve what has been called a '*dalit jurisprudence*' which is more in harmony with the mores and needs of the Indian society.[58]

The basis of legitimacy of this new jurisprudence lies in the Indian social justice approach. In fact, the tradition, culture and religion of the Indians emphasise that the interest of the community as a whole must take precedence over individual interests. Societal obligations are emphasised and a collective approach to solving problems is preferred. This bond of society is known, in Indian terms, as '*dharma*' - something that holds people together.[59] Krishna Iyer says:

> And Indian *dharma*, remember, has asserted, long before the sociological school in the West, that law is the Social Engineering Service of society. True to the genius of our indigenous culture and in tune with the modern dynamics of the rule of law, we have to weave new developmental norms and social values which bind us together in free India and tear up the bygone legal order of the Imperial era which held us prisoner.[60]

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[56] Bhagwati (1984-1985: 570).

[57] Bandhua Mukti Morcha v. Union of India AIR 1984 SC 802 at 839.

[58] Chandrasekharan (1986: 394).

[59] Sharma (1989: 26) provides a detailed analysis of the meaning of dharma and the extent to which it includes and vouchsafes the concept of 'distributive justice'.

[60] Iyer (1976: 2).

The Indian emphasis on social justice has been reflected in the suggestion by Upendra Baxi to use the term SAL (social action litigation) instead of PIL.[61] He argued, among other things, that PIL in the sub-continent and the USA emerged as representing distinctive phases of socio-legal developments of each country and consequently the salient characteristics of its birth and growth are not the same. This notion has its critics,[62] but social activists, including Bhagwati J, supported it enthusiastically. [63] Although the term PIL is still used in general, it has been suggested that PIL is involved where the collective rights of the entire public are affected and no individual is specially affected; SAL involves a determinate group or class of people who has sustained the primary injury involving their socio-economic rights.[64]

The discussion so far illustrates that, although the political role of the judges in PIL cases has been recognised, the focus in India is on social justice. Also, the activists attempted to formulate an indigenous concept of social justice, as opposed to any colonial legacy. However, existing laws could not be challenged on the basis of a social justice approach unless it is supported by the

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[61] Baxi (1985: 290).

[62] The first critique of Baxi's nomenclature came from Agrawala (1985: 7) who argued that this nomenclature makes no essential difference in the basic content and philosophy of PIL. Refusing to believe that the Indian experience is qualitatively different, he says (*Ibid.* at 7-8) that to replace the widely used and understood nomenclature, "a philosophy of SAL as something completely distinguishable from PIL has first to be developed".

[63] Bhagwati (1984-85: 561-577 and 1987: 20-31) is perhaps the most important supporter of SAL. See also Massey (1990: 250, footnote 25); Hussain (1994: 7) and Meer (1993: 39).

[64] See Sorabjee (1997: 28) for a short discussion of this distinction.

Constitution, which is the supreme law of the land. The following sub-chapter discusses the constitutional endorsement of social justice, as understood and interpreted by the pioneers of PIL.

2.2.2 Constitutional provisions supporting social justice in India

The socialist character of the Constitution of India has been emphasised in the Preamble by spelling out the aspiration of the people to secure to all citizens social, economic and political justice. The Preamble also affirms a determination to secure liberty of thought, expression, belief, faith and worship and equality of status and opportunity and to promote amongst the people a feeling of fraternity, ensuring the dignity of the individual and the unity of the nation. In 1976, the 42nd amendment of the constitution added the words 'socialist' and 'secular' making India a 'sovereign socialist secular democratic republic'.[65] The constitution incorporates in Part III a range of Fundamental Rights which are legally enforceable and in Part IV a range of Directive Principles of State Policy which are not enforceable by any court, but are declared to be fundamental in the governance of the country and which the state has a duty to apply in making laws.[66] It is the Directive Principles of the Constitution which elaborate the provisions relating to distributive and social justice.

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[65] Indira Gandhi's Congress party brought the Constitution (Forty-Second Amendment) Act 1976 which replaced 'sovereign democratic republic' with the new terms.

[66] See Jagat Narain (1985: 198-222) for a discussion on the place of the Directive Principles in the Indian Constitution. For a more recent evaluation of the relationship between the Fundamental Rights and the Directive Principles, see Gokulesh Sharma (1993: 75-77).

The Preamble, together with the Fundamental Rights and Directive Principles of State Policy constitute the most creative part of the Indian constitution. Bhagwati says: 'They encapsulate the social and economic rights of the people and hold out social justice as the central feature of the new Constitutional order'.[67] Incorporation of the term 'socialist' and its effect was recognised by the Supreme Court in the Nakara case,[68] where the judges considered 'socialism' as the core basis of the decision itself, not as a mere rhetorical framework and declared that the principal aim of the socialist state is to eliminate inequality in income and status and the basic framework of socialism is to provide a decent standard of life to the working people and especially economic security from the cradle to the grave.

However, the framers of the Indian Constitution were not bound by any specific ideology or method of socialism. A mixed economy, with a great deal of industrial democracy and small scale industries, tending towards small self-sufficient units and self-determination for the individual in the Gandhian sense appears to have been encouraged. The term 'socialist' thus appears to have been used in a specifically Indian sense to ensure that continuous endeavour is made through various means such as nationalisation, taxation, public expenditure and public and private industries in accordance with the demand of time. It represents a process in the evolution of Indian society, says Narain,

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[67] Bhagwati (1984-1985: 568).

[68] Nakara v. Union of India AIR 1983 SC 130. For an earlier exposition of socialism by the court, see Excel Wear v. Union of India (1978) 4 SCC 225. For examples of decisions in line with the Nakara case see Lingappa v. State of Maharashtra AIR 1985 SC 389 and Sadhuram v. Polin AIR 1984 SC 1471.

> . . . to ensure that the wealth and means of production exist for the benefit of all persons in the society rather than for the selfish interest of a few individuals and that the individual is a trustee for the entire society so that the distribution of the material resources subserves the common good.[69]

The above description of the so-called 'Indian socialism' is however a simplification for the purpose of convenience. It may be criticised that this approach makes the constitutional provisions obscure and is but a half-hearted attempt to satisfy both the capitalist and socialist sections of the political spectrum. In Baxi's words, "the motif of socialism looms large in an otherwise bourgeois constitutional text and context".[70] For the activist judges, however, the choice was socialism with strong emphasis on social justice.

It has been claimed that the changes brought forth by the 42nd Amendment and the inclusion of the word 'socialist' in the Preamble can neither be said to have been used in the Marxist or doctrinaire socialist sense nor does it resemble the sense carried by Fabian socialism.[71] Baxi, however, finds in it a mature movement in the Constitutional conception of socialism from the Fabian to Marxist socialism and a systematic class bias towards socialist justice.[72] Likewise, Krishna Iyer has shown his strong reverence for Marx and advocated a cross-pollination of positivism and Marxism.[73]

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[69] Narain (1985: 202).

[70] Baxi (1983: 3) noted that even though the Constitution is avowedly socialistic since the amendment of 1976, judicial interpretation of the Constitution and the major economic legislation continue to betray strong capitalistic bias.

[71] Narain (1985: 202).

[72] Baxi (1983: 3).

[73] Iyer (1992: 18) declares, "All great truths begin as blasphemies and one such great truth is Marxism". For Iyer's approach to legal reform from a socialist

This socialistic bias of the activist judges continues to be vehemently criticised on the ground that they misunderstand the nature of the Indian polity and the intents of the framers of the constitution.[74] Criticisms have also been made that to stretch the constitution in favour of judicial socialism inevitably leads to tall claims, controversy and confusion with very little actual success.[75] Still, the charges of socialism appear to be exaggerated because the courts are fully aware of the limits within which they must operate and are conscious that they cannot significantly re-allocate public resources.[76]

The end result of the controversy appears to be that despite criticisms from the traditionalists and the difference of opinion among the activist judges as to the finer details, it has generally been affirmed and established that the Constitution of India is of a socialist nature - a combined effect of the Preamble, the Fundamental Rights and the Directive Principles. It also follows that the Constitution not only endorses social justice, it demands positive action towards that goal.

However, for the purpose of the development of PIL jurisprudence, this was not sufficient, because the matters relating to distributive and social justice found their place in the 'unenforceable' Directive Principles of State Policy and there arose the important question of how to translate into law the socialist

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perspective, see also Iyer (1991b and 1985). According to Baxi (1985a: 293), Iyer is a neo-Marxist.

[74] See Seervai (1983: 139) and Agrawala (1985).

[75] Parmanand Singh (1986a: 336-347).

[76] Cassels (1989: 512).

approach of the constitution and how to deal with the relationship between the 'enforceable' rights and the 'unenforceable' principles.

Soon after the promulgation of the Constitution, in 1951, the court held in the Dorairajan case[77] that the Directive Principles of State Policy have to conform to and run as subsidiary to the chapter on Fundamental Rights. This was followed in Quareshi[78] explaining that a harmonious interpretation must be placed upon the constitution. Accordingly, the state, while implementing the Directive Principles of State Policy, must do so in such a way that its laws do not take away or abridge the Fundamental Rights. Similarly, in re Kerala Education Bill,[79] it was said that in determining the scope of Fundamental Rights, the court can not entirely ignore the Directive Principles of State Policy but should adopt the principle of harmonious construction and 'should attempt to give effect to both as much as possible'.[80] All these cases proceeded on the assumption that the Fundamental Rights were superior to the Principles and that there is apparently a conflict between the two.

A departure was made in 1970, when Hedge J elaborated the principle of harmonious construction in a different way, explaining that there can be no conflict between the rights and the principles, because 'they are complementary

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[77] Judgment by SR Das J in State of Madras v. Champakam Dorairajan AIR 1951 SC 226 at 228. See also Ajaib Singh v. The State of Punjab AIR 1952 Punj 309 at 319.

[78] MH Quareshi v. State of Bihar AIR 1958 SC 731 at 732.

[79] AIR 1958 SC 956.

[80] *Ibid.* at 957.

and supplementary to each other.[81]

In 1973, in the leading case of Kesavananda Bharati v. State of Kerala[82] it was again held that the rights and the principles supplement each other and it is the duty of the court to ensure the application of the principles in harmony with the rights so long as the basic structure of the constitution is not destroyed. The issue in question was whether parliament can amend the constitution curtailing any of the Fundamental Rights.[83] The court answered in the affirmative and upheld the validity of the newly inserted Article 31C,[84] which conferred on Articles 39(b) and (c) of the Directive Principles a status superior to the Fundamental Rights referred to in Articles 14, 19 and 31. The court observed that while Fundamental Rights cannot be abrogated as a whole, reasonable abridgements of Fundamental Rights could be effected in the public interest.[85] The position was further enhanced when the court held in Mumbai Kamgar Sabha v. Abdulvai[86] that where two judicial choices are available, the

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[81] Chandra Bavan Boarding and Lodging v. State of Mysore AIR 1970 SC 2042 at 2050.

[82] AIR 1973 SC 1461.

[83] Previously, the Supreme Court affirmed that the Parliament can make such amendments in Shankar Prasad v. Union of India AIR 1951 SC 548 and Sajjan Singh v. State of Rajasthan AIR 1965 SC 845. But in Golak Nath v. State of Punjab AIR 1967 SC 1643, this power was taken away. In consequence, the Parliament passed the Constitution (Twenty-fourth Amendment) Act 1971 seeking to restore the power. The 24th Amendment, along with the 25th, 26th and 29th amendments affected the fundamental rights.

[84] Inserted by the Constitution (Twenty-fifth Amendment) Act 1971, section 3.

[85] *Ibid.* at 1462-63.

[86] AIR 1976 SC 1455. This was followed by State of Kerala v. NM Thomas AIR 1976 SC 490.

construction in conformity to the social philosophy of Part IV has preference.

The next great leap was the 42nd amendment (1976) of the constitution. As we saw, this included the word 'socialist' in the Preamble which strengthened the links between the Directive Principles and the Fundamental Rights and impressed upon the judges the importance of the Directive Principles and their obligation to assist in the realisation of social justice.[87] The 42nd amendment also amended article 31C to confer primacy on all the directive principles of state policy over the Fundamental Rights contained in Articles 14, 19 and 31.[88]

However, Article 31C, as amended by the 42nd amendment, was struck down by the Supreme Court in Minerva Mills Ltd. V. Union of India[89] as unconstitutional on the ground that neither the principles, nor the rights can be given absolute supremacy and that to destroy the guarantees given by Part III in order to achieve the goals of Part IV would subvert the constitution by destroying its basic structure. The Court held:

> The Indian Constitution is founded on the bedrock of balance between Part III and Part IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution . . . Anything that destroys the balance between the two parts will *ipso facto* destroy an essential element of the basic structure of the Constitution . . .[90]

In a forceful dissent, Bhagwati J refused to take a formal view of the

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[87] Tope (1982: 254-255).

[88] Subsequently, the Constitution (Forty-forth Amendment) Act 1978, as an extension of the 42nd amendment, further strengthened the position of the Directive Principles by incorporating new articles and by removing the right to property altogether from the list of fundamental rights and by placing it elsewhere as Article 300A.

[89] AIR 1980 SC 1789.

[90] *Ibid.* at 1790.

constitution, especially with regard to the right to equality guaranteed by Article 14. This guarantee does not entail mere formal equality but embodies the concept of real and substantive equality which struck at inequalities arising on account of vast social and economic differentials and is consequently "an essential ingredient of social and economic justice".[91] So he maintained that although a law giving effect to social and economic justice in pursuance of Directive Principles might conflict with a formal and doctrinaire view of 'equality before the law' guarantees, yet it would almost always conform to the principle of equality before the law in its total magnitude and dimension.

In the aftermath of Minerva, in spite of a number of well-pronounced judgements, the debate has not been settled.[92] The notion that Fundamental Rights override Directive Principles is still being supported by some writers and judges.[93] But the principle of harmonious construction is followed in most of the cases.[94] In line with Bhagwati's dissenting opinion affirming the priority of the principles, in the case of Sanjeeva Coke Manufacturing Co. V. Bharat Coking

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[91] *Ibid.* at 1850.

[92] Gokulesh Sharma (1993: 77) says that the situation remains unclear, although the courts have shown much judicial wisdom. Asad Hossain Choudhury (1996: 16-23), however, believes that there has been a continuous process of development in favour of the principles.

[93] C Singh (1982: 100) says that the directive principles misrepresent and misunderstand the function of law being a part of imperialistic and paternalistic ideology. Seervai (1983: 1577-1694) criticised Minerva by saying that it represents 'the current fashionable view'. For a recent case, see Supreme Court Employees Welfare Association v. Union of India AIR 1990 SC 334.

[94] See for example State of Tamil Nadu v. Abu Kavur Bai AIR 1984 SC 326; Karmachari Sangh v. Union of India (1981) 1 SCC 246 at 308.

Coal Ltd,[95] the court severely criticised the majority view of Minerva, but it was not overruled. However, in a number of cases, the court upheld the importance of social legislation and sought to restore the Directive Principles impinging on Fundamental Rights.[96] The Indian experience shows that despite the compartmentalisation of the rights and principles, there has been, in practice, a dynamic interaction between these two parts which gradually enhanced the status of the principles.

It may be summarised that in India, the 'social consciousness' of the judges led them to 'social activism'. They rejected the 'colonial Anglo-Saxon' jurisprudence and insisted that they possess law-making power. They advocated a social justice approach that has drawn its legitimacy from the socio-cultural norms of the country and from the Constitution. Since these social justice principles of the Constitution are placed as non-enforceable Directive Principles, a gradual enhancement of the status of the principles vis-à-vis the Fundamental Rights has been observed. This has enabled the court to emphasise social and collective rights and thus construct the rules of PIL.

2.3 The conceptual and constitutional basis of PIL in Pakistan and the Islamic approach

Pakistan was soon to follow the Indian example when PIL developed in the late

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[95] AIR 1982 SC 239.

[96] See for example: Laxmi Khandsari v. State of Uttar Pradesh AIR 1981 SC 873; Sonia Bhatia v. State of Uttar Pradesh AIR 1981 SC 1274 and Daktar Mazdoor Manch v. Union of India AIR 1987 SC 2342.

1980s.[97] In 1988, the decision of the Supreme Court in Miss Benazir Bhutto v. Federation of Pakistan[98] paved the way for PIL. This was followed by the leading case of Darshan Masih alias Rehmatay and others v. The State.[99] Afzal Zullah CJ, followed by Nasim Hasan Shah CJ, played vital role in the development of PIL as they invited PIL cases and attempted to establish a procedural framework to deal with PIL petitions.[100] The argument that India has been influenced by the West in the development of PIL can be applied to the Pakistani scenario by saying that Pakistan has been influenced by the West and India, especially the latter.[101]

Pakistan, being an underdeveloped country like India, has the same problems of poverty and social injustice. Executive lawlessness combined with the failure of the legislature to ensure the progress of law has given rise to similar types of frustrations as have been experienced by the Indians. But perhaps the situation has been even more complicated in Pakistan because of the failure of democracy for prolonged periods due to the imposition of martial law.[102] While

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[97] MH Khan (1993) provides the most comprehensive work on the Pakistani development. See also Faqir Hussain (1993) and Syed Mushtaq Hussain (1994).

[98] PLD 1988 SC 416.

[99] PLD 1990 SC 513.

[100] See Quetta Conference (1991: 126-152). The judges attempted to create a special procedural structure within the judiciary, with the help of the administration, to receive and consider PIL petitions promptly. However, this project appears to have been abandoned now.

[101] See, for example, MH Khan (1993: 9) who discusses Trubek and Cappelletti, but this is after PIL has already been introduced in Pakistan.

[102] Pakistan gained its independence also in 1947. It had its first Constitution only in 1956 which was annulled in 1958 by the first Martial Law. The second Constitution was adopted in 1962, but was abrogated in 1969 by the second Martial law. In 1973, came the third Constitution but it was kept in abeyance

Pakistan had three Constitutions in the formal sense of the term, there were several interim Constitutions in between.[103] One consequence of this chaos was the pathetic plight of the status of the fundamental rights of the people. Annulled, curbed or declared non-applicable, these rights could not be claimed by the aggrieved for long periods at a time. Whenever the Constitution was restored, the judiciary started to move towards establishing its authority till the next Martial Law came to halt everything once again.

This situation resulted in the popular perception that the traditional litigation was failing in many respects. The realisation dawned that ". . . the weaker sections of society because of their economic or social position, remain cut off from the rest of the society and thereby suffer hardships"[104]. The integrity of the entire legal system was in question, as Khan observed that the people seemingly do not respect the "Common Law" which they feel has been imported into the country.[105] This feeling, it has been noted, was shared by a number of

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from 1977 to 1985 by another Martial Law regime. For a constitutional history of Pakistan, see GW Choudhury (1969), Masud Ahmad (1978), Riaz Ahmad (1981), and Newberg (1995).

[103] MH Khan (1993: footnote 2 at p.29), referring to the arguments forwarded by Shah (1986: 70) and Munir (1976: 62), argues that Pakistan has experienced nine constitutional arrangements since its independence in 1947. These are: (i) Government of India Act 1935 as adopted by Pakistan (Provisional Constitution) Order 1947; (ii) Constitution of 1956; (iii) The Laws (Continuance in Force) Order 1958; (iv) Constitution of 1962; (v) Provisional Constitution Order 1969; (vi) The Interim Constitution of 1972; (vii) Constitution of 1973; (viii) The Laws (Continuance in Force) Order 1977; and (ix) Provisional Constitution Order 1981.

[104] MH Khan (1992: 92).

[105] *Id.*

judges.[106]

The situation started changing as soon as the Martial Law was lifted in 1985. In fact, this may be compared with the Indian situation in the aftermath of the emergency.[107] The media came forward and started exposing social evils of the country.[108] Investigative journalism was becoming very successful. Theatres, television programmes, books and articles all played their part in augmenting social consciousness.

At the same time, Pakistan witnessed a newly heightened social consciousness of the judiciary, the same factor that earlier played an important part in the development of PIL in India. Having the Constitution working with all the Fundamental Rights fully restored, the judges began to appreciate their role and responsibility. This re-evaluation generated a change of attitude of the judiciary, termed by Mahmood and Shaukat as 'judicial glasnost';[109] a conscious effort to resort to judicial activism when necessary. The court gradually started not only self-criticism, but allowed criticism and fair comment from the legal scholars and even from the press.[110]

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[106] MH Khan (1993: 51) quotes Hamood-ur-Rahman CJ who in 1975 appealed to discard the principles of administration of justice based on Anglo-Saxon ideas. Similarly, Justice Afzal Zullah has repeatedly refused to apply English legal principles on the ground that they are inadequate to ensure justice. See for example, Haji Nizam Khan v. Additional District Judge PLD 1976 Lah 930 and Ghulam Ali v. Ghulam Sarwar Naqvi PLD 1990 SC 1.

[107] See above, pp. 28-29.

[108] While describing the role of the media in detail MH Khan (1993: 54) says: "The PIL which we are witnessing in Pakistan today is, to quite some extent, media spurred".

[109] Mahmood and Shaukat (1992: Preface iv).

[110] See MH Khan (1993: 40-43) for further discussion. One of the examples he cites

The role of this social consciousness of the judges in the development of PIL is apparent from the way they describe PIL. In Pakistan, PIL has been consistently described as a task of the eradication of social evils through the medium of law.[111] Justice Shah says:

> Law is a dynamic instrument fashioned by society for the purpose of achieving harmonious adjustment of human relations by eliminating social tensions and conflicts. If the law fails to respond to the needs of a changing society then either it will stifle the growth of the society and choke its progress or if the society is vigorous enough, it will cast away the law which stands in the way of its growth. Let me emphasise that if law is to earn the respect of the people and achieve its purpose of correcting injustices and to restore social equilibrium in the society it must accord with the concept of social justice.[112]

Although the promoters of PIL in Pakistan shared the notion of social consciousness with their Indian counterparts, one distinguishing element was apparent from the very beginning - the emphasis on Islam. While the Indians, under their secular Constitution, could not directly resort to the notions of *'Dharma'*, the Pakistanis having an Islamic constitution, could not ignore Islam. Especially because, by the time PIL was being introduced, Islamisation of Pakistan was in full swing.

In spite of the different ways of interpretation, Islamisation is, in its broad sense, an attempt to harmonise different aspects of the life of individuals, societies and nations in accordance with the Islamic tenets. Kaushik says:

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to prove his point involves a case where a lawyer moved an application for contempt of court against a Chief Justice because some of the judges were seen queuing up "just to receive the favour of a handshake from the ruler of the day". This appears to be an aggressive attempt by an activist to uphold the dignity of the judiciary.

[111] MH Khan (1992: 84); Shah (1993b: 31).

[112] Shah (1993a: 29).

> Islamization can broadly be identified as a historic process of religious socialisation in accordance with Islamic norms, precepts, value postulates and rituals. In other words, it underlines a process of religious orientation, indoctrination and enforcement of Islamic beliefs, traditions and thought processes. Owing to the pervasive nature of Islam, Islamization as a process assumes a wider scope and perspective encompassing philosophical, socio-economic and political strands of an individual follower of Islam or a Muslim community.[113]

In Pakistan, Islamisation has its roots in the very creation of the State.[114] When British India gained its independence from colonial rule, Islam was the basis on which two countries emerged instead of one. Pakistan was advocated and realised with the perceived notion that British Indian Muslims have their own history, culture, world view and aspirations sufficiently distinct from that of the Hindu majority to consider them as a separate nation. But at the time of its creation, due to the essentially modernist consensus of the leadership about the place of Islam, Pakistan was more secular than religious. As a compromise between the demands of the Islamists and the secularists, a commitment to Islam was acknowledged. Successive Pakistani Constitutions declared that Sovereignty belongs to Allah, the laws of Pakistan would be in accordance with the Quran and Sunna and provided for certain Islamic institutions. A slow headway towards Islamisation resulted due to the constant pressure from the Islamists and attempts by dictators or failing leadership to gain legitimacy by championing Islam.[115]

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[113] Kaushik (1993: 8).

[114] Taylor (1983: 181-194) provides a summarised version of the background of Islamisation in general. For more detailed account see Iqbal (1986). For Islamisation of law in Pakistan see Patel (1986), Mehdi (1994) and Shah (1995: 37-53).

[115] According to Taylor (1983: 181) this is 'Islamic symbolism'; Richter (1986: 131) terms it 'defensive Islamisation'.

Effective Islamisation of Pakistan started in 1977 when the secular leadership of Bhutto was replaced by General Zia-ul-Haque. General Zia took several years to implement his ideas covering various aspects of the national life. The Constitution was changed affecting the structure of the government, introducing institutions like Shariat Courts and Majlis-i-Shura.[116] Statutes were amended, repealed and promulgated effecting various aspects such as the penal laws, employment laws and the land laws of the country.[117] The force of Islamisation was felt in the legal field not only as new Islamic laws but a number of judges started Islamising the law through their judgements.[118]

While introducing PIL, as they were under the Islamisation process, a most important issue for the pioneering judges was whether PIL conforms with the Islamic principles. They established this conformity and proceeded further by showing that the inspiration and rationale of PIL can be drawn from Islam itself.[119] A Muslim individually and a society collectively must encourage and fight for good deeds and discourage and prevent bad deeds - the duty to uphold human rights, or *haque-ul-abad*, is a paramount duty.[120] This concept of human rights is much wider than the notions of a number of Fundamental Rights

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[116] For a comprehensive list of the Islamic provisions in the Constitution of Pakistan, see Khosa (1995a: 17-22).

[117] Shah (1995: 37-53) furnishes an overview of these statutes and concludes that by 1995, practically all the laws in force in Pakistan have been brought in accord with the Islamic injunctions.

[118] MH Khan (1993: 48-55).

[119] Awan (1992: 68) and MH Khan (1993: 48-53).

[120] This is known as the principle of *amer bil maroof* and *nehi anil munkir*. See Awan (1992: 67-68).

declared in the Constitution. It is a constitutional obligation of an Islamic State to protect the rights of every individual and for this purpose justice based on *Adl* and *Ahsan* fully meets the requirements of social, economic and political justice. Al-Quran, the sacred book, says:

> O ye who believe! Stand out firmly for Allah as witness to fair dealing, and let not the hatred of others to you made you swerve to wrong and depart from justice. Be just: that is next to piety: and fear Allah, for Allah is well acquainted with all that ye do.[121]

This and many other similar declarations provide the validity and legality of a social justice approach.

In the light of this special status of Islam in Pakistan, PIL activists were required to establish that the concept and techniques of PIL are in conformity with the Islamic provisions as enshrined in the Constitution of Pakistan.[122] Pakistan is an Islamic Republic where Islam is the state religion, it is not a secular state like India.[123] The Constitution contains a number of very important Islamic provisions.[124] Out of these, the Preamble or the Objectives Resolution and the principles of policy are very significant.

The Preamble, containing the Objectives Resolution, declares the sovereignty of Allah alone which is delegated to the State of Pakistan through its people for being exercised within the limits prescribed by Him as a sacred trust.

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[121] Al-Quran Chapter 5 Ayat 8. For further examples, see Chapter 2 Ayat 195, Chapter 7 Ayat 29, and Chapter 31 Ayat 92.

[122] For a discussion about the constitutionality of PIL in Pakistan, see Hussain (1993: 76-83) and MH Khan (1993: 43-48).

[123] Articles 1(1) and 2 of the Constitution of Pakistan, 1973.

[124] Khosa (1995a: 17-22) outlines the Islamic provisions of the Constitution of 1973 and compares them with the Islamic provisions of the earlier Constitutions.

It also declares that the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed and that the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and the Sunna. Chapter 2 of the Constitution provides for the Principles of Policy. They include, among other things, the duty of the State to take steps to ensure the Islamic way of life (Article 31), promotion of social justice and eradication of social evils (Article 37) and the promotion of social and economic well-being of the people (Article 38).

The Fundamental Rights as guaranteed by the Constitution have been discussed in Part II, Chapter I (Articles 8-28). They generally provide first generation or political rights, such as the right to life or liberty, freedom of movement, assembly and speech, right to property, right to equality and non-discrimination etc. Article 199 provides for the writ jurisdiction of the High Court giving it power to make orders to enforce the Fundamental Rights guaranteed by the Constitution. The Supreme Court has similar powers to issue writs under Article 184(3) when it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights is involved.

The Preamble and the Principles of Policy in the Constitution do not have the same status as the Fundamental Rights, even though they contain the bulk of the social and collective rights. In the Constitution of 1956, Article 23 declared that the State was to be guided in the formation of its policies by the Directive Principles but such provisions could not be enforced in any Court. Article 7 of

the Constitution of 1962 and Article 29 of the Constitution of 1973 said, with respect to the Principles of Policy, that it is the responsibility of each organ and authority of the State, and of each person performing functions on behalf of an organ or authority of the State, to act in accordance with those principles in so far as they relate to the functions of the organ or authority.

Despite the non-enforceability, the court proceeded to interpret the provisions creatively in Haji Nizam Khan v. Additional District Judge:

> The judiciary which is not included in the definition of the State cannot direct the organs, authorities and persons included in the definition of the State to act in accordance with the principles of policy. But this does not mean that the Superior Judiciary would not be able, on account of the said bar, either: (i) to set down a rule for itself to follow the Principles of Policy: or (ii) to declare it for the subordinate judiciary to act in accordance therewith.[125]

With the insertion of Article 2A in the Constitution in 1985, the responsibility to act in accordance with the principles has gained further support.[126] Article 2A declares that the principles and provisions set out in the Objectives Resolution are a substantive part of the Constitution and shall have effect accordingly. If any organ of the State fails to implement the sacred pledge as set out in the Principles of Policy, then there is no impediment on the judiciary to give effect to these principles. The Preamble and Article 2A, which emphasises the rights guaranteed by Islam, thus became powerful weapons to be used by activist judges.

Accordingly, in the case of Benazir Bhutto v. Federation of Pakistan[127] the

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[125] Above note 106 at 979.

[126] Revival of the Constitution 1973 Order, 1985 (Presidential Order 14 of 1985).

[127] Above note 98.

Supreme Court extended the scope of Fundamental Rights and observed that such rights include the rights guaranteed by Article 2A as well as the rights available under the Directive Principles of Policy. The court explained:

> While construing Article 184(3), the interpretative approach should not be ceremonious observance of the rules or usage of interpretation, but regard should be had to the object and the purpose for which this Article is enacted i.e. this interpretative approach must receive inspiration from the triad of provisions which saturate and invigorate the entire Constitution, namely, the Objectives Resolution (Article 2A), the fundamental Rights and the Directive Principles of State Policy so as to achieve democracy, tolerance, equality and social justice according to Islam.[128]

This is a very wide approach and enables the court to assume an activist role in promoting Islamic socio-economic and political justice declared in the non-enforceable Objectives Resolution and Directive Principles. Subsequently, in Darshan Masih v. The State,[129] the Court held that any conceivable just and proper order can be passed which is deemed to be appropriate for enforcement of these rights. This opened the gates for PIL and soon afterwards, in the Quetta conference, the judges invited PIL cases by declaring a procedural structure to receive and consider PIL petitions.[130]

It may be summarised that in Pakistan, similar to India, the judges were motivated by a strong sense of 'social consciousness'. They were ready to discard traditional principles through social activism. Due to the ongoing Islamisation of the laws, they demonstrated that PIL is not contradictory to Islamic principles and further proceeded to show that PIL draws its inspiration and legitimacy from the

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[128] *Ibid.* at 421.

[129] Above note 99.

[130] Quetta Conference (1991: 126-152).

Islamic social justice tenets as has been declared by the Constitution. The non-enforceable principles of policy, which contain the Islamic social justice rights, were given a very high status in relation to the Fundamental Rights. This enabled the judges to promote economic and social rights and formulate the principles of PIL.

2.4 Conceptual and constitutional basis of PIL in Bangladesh

As regards the background of the development of PIL, the Bangladeshi situation is similar to that of Pakistan and India in several respects. First, there is a common historical heritage. Bangladesh was a part of British India till 1947 and then of Pakistan till 1971. Second, the social and economic conditions in Bangladesh are very similar to the two neighbours - all of them are third world developing countries. Third, as PIL developed in India after the withdrawal of Emergency and in Pakistan after the termination of martial law, it developed in Bangladesh after the restoration of democracy in 1990.

Due to these similarities, it may be assumed that the Bangladeshi lawyers and judges advocated the same type of social justice approach as in India or Pakistan. But in practice, the constitutional provisions as well as the constitutional developments are distinct enough for the Bangladeshi Court to proceed in a somewhat different direction. The present sub-chapter analyses the ways in which the spirit of the Constitution is explained and understood by the Bangladeshi Supreme Court. We argue that the result has been a theoretical basis of PIL where the primary emphasis is not on social and economic justice of the

people but on the place of the citizen applicants in the power-relations debate.

The development and growth of the cases and activities relating to PIL will be analysed in detail in chapter 3. Here, our concern is to examine the rules of interpretation of the constitutional provisions in favour of the recognition of PIL.

2.4.1 Social and collective justice provisions in the Constitution of Bangladesh

The bias towards social and collective justice in the Constitution of Bangladesh can be traced back to its origin. In April 1971, the Proclamation of Independence was issued.[131] This historic document proclaimed independence against unjust war and genocide and acclaimed heroism, bravery and revolutionary fervour of the people. A major aim was ". . . to ensure for the people of Bangladesh equality, human dignity and social justice."[132] So the document envisaged was an 'autochthonous' and 'social justice' Constitution. In December 1972, the Constitution was adopted. The Preamble of the Constitution of Bangladesh says:

> We, the people of Bangladesh, having proclaimed our independence on the 26th day of March, 1971 and through a historic war for national independence, established the independent sovereign People's Republic of Bangladesh;
>
> Pledging that the high ideals of absolute trust and faith in the Almighty Allah, nationalism, democracy and socialism meaning economic and social justice, which inspired our heroic people to dedicate themselves to, and our brave martyrs to sacrifice their lives in, the war for national independence, shall be fundamental principles of the Constitution;

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[131] See AP Blaustein *et al.* (eds.) (1977: 59-61) for the text of the Proclamation.

[132] *Ibid.* at 60.

> Further pledging that it shall be a fundamental aim of the State to realise through the democratic process a socialist society, free from exploitation - a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens;
>
> Affirming that it is our sacred duty to safeguard, protect and defend this Constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh so that we may prosper in freedom and may make our full contribution towards international peace and co-operation in keeping with the progressive aspirations of mankind;
>
> In our Constituent Assembly, this eighteenth day of Kartick, 1379 B.S. corresponding to the fourth day of November, 1972 A.D., do hereby adopt, enact and give to ourselves this Constitution.

There are certain general rules of interpretation of the Preamble.[133] It is neither a source of power nor a limitation on the enacting provisions of the Constitution. It can not be used to modify the clear language of the Constitution but if the language indicates more than one meaning, the meaning which is nearest to the purpose of the Constitution is to be preferred. In cases of ambiguity of the enacting part, the Preamble may be considered in order to resolve the doubt.

Despite these general rules, judges in the 8th Amendment case[134] held that it is the intention of the makers of the original Constitution, as expressed in the Preamble, that is the guide to its interpretation - they regard the Preamble as the pole star and a part of the Constitution.[135] This is declared on the basis that

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[133] Mahmudul Islam (1995: 44) examines these principles with reference to the Bangladesh Constitution.

[134] Anwar Hossain Chowdhury v. Bangladesh 1989 BLD (Spl) 1.

[135] *Ibid.* at 59, 147 and 174.

the Preamble can only be amended by referendum.[136] Thus when a constitutional provision is clear but runs counter to the Preamble, the intention of the framers of the Constitution must be considered.[137]

As a result the intention of the framers to attain a socialist society through democratic means becomes very important. 'Socialism meaning economic and social justice' requires to be attained. In the 8th Amendment case, BH Chowdhury J boasts that few constitutions have a Preamble like this one and observes that the Preamble under the Bangladesh Constitution is given a status higher than it enjoys in the Indian or Pakistani Constitution.[138] In a recent case, Mustafa Kamal J says:

> . . . the Preamble of our constitution stands on a different footing from that of other Constitutions by the very fact of the essence of its birth which is different from others.[139]

While interpreting the Preamble in favour of social and collective justice, it must be read along with Article 7. It declares:

> (1) All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution.
>
> (2) This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.

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[136] Under Article 142(1A), an amendment of the Preamble, along with some other important Articles, requires a referendum.

[137] This does not, however, mean that the Court can stretch the meaning so as to support any interpretation it wants to give.

[138] Above note 134 at 59.

[139] Dr Mohiuddin Farooque v. Bangladesh and others (FAP 20) 17 BLD (AD) (1997) 1.

The various functionaries and institutions created by the Constitution exercise people's power, not their own indigenous or native powers. Mustafa Kamal J regards this Article as a cornerstone of the Constitution and a proud expression of constitutionalism.[140] Latifur Rahman J observed recently in FAP 20:

> This supremacy of the Constitution is a special and unique feature in our Constitution. Neither in the constitution of India nor in the Constitution of Pakistan there is reassertion of the supremacy of the Constitution. This is a substantive provision which contemplates exercise of all powers in the Republic through the authority of the Constitution.[141]

Since the ultimate power belongs to the people, the priority must be given to their collective rights and interests. This is in harmony with the aims and objectives of the Constitution as declared in the Preamble.

As to the rights and interests of the people that are to be upheld in accordance with Article 7, the Constitution declares certain matters to be fundamental. Part II of the Constitution (Articles 8-25) contains the Fundamental Principles of State Policy while Part III (Articles 26-47) sets out the Fundamental Rights. These provisions are very much similar to those of the Indian and Pakistani constitutions.[142]

Regarding the Fundamental Principles, Article 8(2) says:

> The principles set out in this Part shall be fundamental to the governance of Bangladesh, shall be applied by the State in the making of laws, shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh, and shall form the basis of the work of the State and of its citizens, but shall not be judicially enforceable.

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[140] Mustafa Kamal (1995: 9).

[141] Above note 139 at 23. However, it must be noted that although Article 7 emphasises supremacy of the Constitution, such supremacy is automatically preserved in a written Constitution whether or not expressly declared.

[142] See above chapters 2.2.2 and 2.3.

Article 8(1) says that the principles of absolute trust and faith in the Almighty Allah, nationalism, democracy and socialism meaning economic and social justice, together with the principles derived from them as set out in Part II constitute the Fundamental Principles of state policy. It also states that absolute trust and faith in the Almighty Allah shall be the basis of all actions.

BH Chowdhury J notes in the 8th Amendment case that Article 8 is a protected Article and cannot be amended without referendum.[143] This shows the importance attached to this Article. Kamal Hossain says that the Bangladesh Constitution has gone beyond both the Indian and Pakistani Constitution in this regard.[144] It not only lays down that these principles would be applied in law making as provided in the Indian Constitution, but it also declares the Principles as guide to the interpretation of laws and basis of the work of the State and its citizens.

The Constitution sets out the Fundamental Principles under the following heads: promotion of local government institutions (Article 9), participation of women in national life (Article 10), democracy and human rights (Article 11), principles of ownership (Article 13), emancipation of peasants and workers (Article 14), provision of basic necessities (Article 15), rural development and agricultural revolution (Article 16), free and compulsory education (Article 17), public health and morality (Article 18), equality of opportunity (Article 19), work as a right and duty (Article 20), duties of citizens and of public servants (Article

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[143] Above note 134 at 61.

[144] Kamal Hossain (1992: 9 and 1997: 49).

21), separation of judiciary from the executive (Article 22), national culture (Article 23), national monuments (Article 24), promotion of international peace, security and solidarity (Article 25).

The Fundamental Principles contain a charter for extensive affirmative action. They are re-distributory rather than conservative in character and aim to bring change in a constitutional way. Ishtiaq Ahmed goes so far as to say that they are the nation's dream of social revolution.[145]

As regards the Fundamental Rights, Art 26 declares that all existing and newly made laws must conform with Part III containing Fundamental rights and any inconsistent law will become void to the extent of such inconsistency. The Fundamental Rights guaranteed under Part III include: equality before law (Article 27), discrimination on grounds of religion, etc. (Article 28), equality of opportunity in public employment (Article 29), prohibition of foreign titles, etc. (Article 30), right to protection of law (Article 31), protection of right to life and personal liberty (Article 32), safeguards as to arrest and detention (Article 33), prohibition of forced labour (Article 34), protection in respect of trial and punishment (Article 35), freedom of movement (Article 36), freedom of assembly (Article 37), freedom of association (Article 38), freedom of thought and conscience, and of speech (Article 39), freedom of profession or occupation (Article 40), freedom of religion (Article 41), rights to property (Article 42) and protection of home and correspondence (Article 43).

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[145] Ishtiaq Ahmed (1993: 36).

Article 44 declares that the right to move the High Court Division for the enforcement of the Fundamental Rights conferred by Part III is guaranteed.[146] Powers of the High Court Division to issue 'certain orders and directions' in order to enforce the Fundamental Rights are elaborated in Article 102.[147] Although the word 'writ' is not used, this Article specifically deals with all the five types of writs known and used in common law jurisdictions.[148] This Article provides a mechanism to enforce public rights and interests.

2.4.2 Inter-relation between principles and rights

Apparently, the broad provisions of the Constitution of Bangladesh are similar to the comparable provisions of the Indian and Pakistani constitutions. Accordingly, the point of demarcation between the rights and the principles is judicial enforceability.[149] Similarly, the Rights guaranteed under Part III are political in nature while the Principles declared in Part II relate to economic, social and cultural matters.

We have already analysed the ways in which the unenforceable Principles

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[146] It has been held in Haji Joynal Abedin v. State 30 DLR (1978) 375 that the right to enforce the Fundamental Rights is itself a Fundamental Right. See also Government of Bangladesh v. Ahmad Najir 33 DLR (AD) (1981) 257. The effect is clearly demonstrated in the recent case of Jobon Nahar and other v. Bangladesh and others 49 DLR (1997) 108. In this case the Court held that since the right to enforce a Fundamental Right is another Fundamental Right, the petitioner can move the Court even though his application was rejected by the Court of Settlement on the ground of limitation. In India, the situation is the same under Article 32 of the Constitution.

[147] For the text of Article 102, see below chapter 4.3.

[148] For further discussion, see below chapter 4.3.

[149] Article 8(2) and 26 of the Constitution of Bangladesh.

are given very high status in India and Pakistan.[150] Such an emphasis on the Principles enables the Court to give priority to social and economic matters and serves the interest of the people. In fact, the extent of the importance given to the Principles is indicative of the Court's commitment to social justice. In the Bangladeshi context, the issue is to what extent the Court is emphasising on the importance of the Fundamental Principles vis-à-vis the Fundamental Rights.

Generally, the position of the Principles as regards the interpretation of the Bangladesh Constitution is the same as in India. The Principles are a guide to interpretation and the Court must construe constitutional and legal provisions in conformity with the Principles.[151] Any law made to further the Principles is *prima facie* constitutional. The Principles are used to test the reasonableness of legal and constitutional provisions and in cases of vagueness or double meaning of any law, the meaning close to the Principles must be taken. In cases of a provision apparently repugnant to the Principles, the Court must attempt to interpret the provision in conformity with the Principles.

This raises the question of conflict between Principles and Rights. We have already seen the Indian position where the judges have discarded the 'supremacy of rights' doctrine and have gradually adopted a liberal 'harmonious interpretation' rule, giving the Principles higher importance.[152] Mahmudul Islam observes that since the Bangladeshi and Indian constitutional scheme in this

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[150] See above chapters 2.2.2 and 2.3.

[151] For a discussion in the context of the Bangladeshi Constitution, see Mahmudul Islam (1995: 49).

[152] See above chapter 2.2.2.

regard is the same, "the same position should obtain under our constitutional dispensation."[153]

However, in anticipation of possible conflicts in cases where welfare measures of the State might conflict with the Fundamental Rights, the framers of the Constitution provided some exceptions in Article 47(1).[154] In matters specified in that Article, any law made shall be immune from challenge on the ground of inconsistency with the Fundamental Rights if the Parliament declares that such law has been made to give effect to any of the Fundamental Principles.[155] Accordingly, classification of statutes by the Parliament will prevent a conflicting situation. Sultan Hossain Khan J declared that the Court has wide powers in this matter because the reasonableness of such classification is justiciable by the Court:

> In case of conflict between Fundamental Rights and Fundamental Principles of State Policy, the Fundamental Rights shall prevail and laws so made which are inconsistent with Fundamental Rights should be declared void by this court. It is, however, to be noticed that in order to strike a balance between public good and fundamental right of an individual, harmony is to be established between a statute seeking welfare of the community and fundamental right and to that end the executive is authorised to make a reasonable classification as to the subject matter of the statute. This reasonableness of the classification

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[153] Mahmudul Islam (1995: 50).

[154] The exceptions include: acquisition, nationalisation, requisition or taking over control or management of property; amalgamation of commercial or other bodies; controlling the rights of administrators or executives of such bodies; controlling rights to search mineral wealth; protection of government ventures through monopoly; controlling rights to property and any right in respect of profession, occupation, trade or business including rights of employers or employees.

[155] According to Gajendragadkar (1975: 4) this provision shows that the founding fathers attached great importance to the Principles and they wanted to reserve to Parliament full freedom to regulate or control, within reasonable limits, the Fundamental Rights in order to achieve the objectives mentioned in Part II.

> is justiciable by Superior Court and must be judged by standards of an ordinary, prudent and reasonable man.[156]

This does not, however, conclusively answer the question of enforceability of the Fundamental Principles where there is no conflict with the Rights. In Sheikh Abdus Sabur v. Returning Officer and others,[157] BH Chowdhury CJ held that the Fundamental Principles of State Policy cannot be judicially enforced despite the supremacy of the Constitution recognised by the Constitution itself. However, a more elaborate discussion can be found in the recent case of Kudrat-E-Elahi Panir v. Bangladesh,[158] where Shahabuddin J said:

> The reason for not making these principles judicially enforceable is obvious. They are in the nature of People's programme for socio-economic development of the country in peaceful manner, not overnight, but gradually. Implementation of these Programmes require resources, technical know-how and many other things including mass-education. Whether all these pre-requisites for a peaceful socio-economic revolution exist is for the State to decide.[159]

The Court discussed the claim that even if the Principles are not enforceable, the Court can declare a law void on the ground of manifest inconsistency with any provision of the Constitution including the Principles. The Court examined a number of Indian PIL cases and concluded that they are not relevant since no law was made in contravention of any Directive Principle in those cases. In a concurring opinion, Mustafa Kamal J explained:

> It is the Law of the Constitution itself that the fundamental principles of state policy are not laws themselves but 'principles'. To equate 'principles' with 'laws' is to go against the Law of the Constitution itself. These principles shall be applied by the State in the making of

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[156] Hamidul Huq Chowdhury v. Bangladesh 34 DLR (1982) 190 at 200.

[157] 41 DLR (AD) (1989) 30.

[158] 44 DLR (AD) (1992) 319.

[159] *Ibid.* at 331.

> laws, i.e., principles of policy will serve as a beacon of light in the making of laws, shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh, and shall form the basis of the work of the State and of its citizens. Not being laws, these principles shall not be judicially enforceable.[160]

He refused to accept an interpretation which would bring the principles at par with the rights on two grounds: first, the framers of the Constitution, if they so wished, would have provided for such an expression - the omission was 'deliberate and calculative'. Second, Article 8(2) proclaims the Fundamental Principles of State Policy as principles, not laws and that is the mandate of the Constitution.

This rather traditional stance of the Appellate Division appears to be rigid and unfavourable to creative interpretation of the provisions of the Fundamental Principles. The only way for the progressive judges is to resort to the rule that the Principles are a guide to interpretation, and avoid any dispute as to the primacy of Rights over the Principles.

The leading example on the matter is Kudrat-E-Elahi Panir[161] where the Appellate Division was asked to interpret Article 59 relating to local government. The Court took the help of the Fundamental Principles enumerated in Articles 9 and 11 relating to popular representation and democracy and consequently held that there was no scope for forming a local government body composed of non-elected persons.[162] Recently, in Aftab Uddin v. Bangladesh,[163] the issue was the

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[160] *Ibid.* at 346.

[161] Above note 158.

[162] *Ibid.* at 336.

[163] 48 DLR (1996) 1.

interpretation of Article 116 relating to the control and discipline of the sub-ordinate courts. Naimuddin Ahmed J interpreted the Article in favour of the constitutional aim of separation of judiciary as has been enunciated in the Preamble and the Fundamental Principles.

This technique of expanding the scope of Fundamental Rights has been used in a few public interest cases. In Danish Milk,[164] the right to life has been expanded to mean right to protection of health and normal longevity of an ordinary human being.[165] Kazi Ebadul Hoque J expanded the meaning of Articles 31 and 32 with the help of Article 18(1), which contains the Principle relating to public health and morality. In FAP 20,[166] BB Roy Choudhury declared that right to life encompasses within its ambit the protection and preservation of environment and ecological balance. The fact that the Bangladeshi Constitution has no provision relating to environment similar to Article 48A of the Indian Constitution did not prevent the judge from making this expansion.

Our discussion illustrates that the most peculiar feature, in the inter-relation between the Rights and the Principles in Bangladesh, is the provision of Article 47(1). Laws relating to specific matters are granted immunity even if they contradict the Rights if the Parliament declares that such law has been made to give effect to any of the Principles. Article 47(1) has enhanced the position and

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[164] Dr Mohiuddin Farooque v. Bangladesh, represented by Secretary of the Ministry of Commerce and others 48 DLR (1996) 438 at 442.

[165] The judge followed a number of Indian decisions including Bandhua Mukti Morcha v. Union of India AIR 1984 SC 802 and Olga Tellis v. Bombay Municipal Corporation AIR 1986 SC 180.

[166] Above note 139 at 33.

status of the Principles as Parliament has been given express power to make laws to attain the objectives of the Principles. This has helped to avoid possible confrontations between Rights and Principles in many cases. However, protection of Article 47(1) means that the judges can not challenge a considerable amount of legislation in spite of violation of Fundamental Rights. There is less room for them to manoeuvre.

As to the emphasis of the Bangladeshi Court on the Principles, it appears that strict adherence to the rule of non-enforceability in Kudrat-E-Elahi Panir[167] has limited the scope of judicial activism. The position of the Supreme Court appears to be less activist than that of the Indian courts. Progressive judges resorted to the only way open for creative interpretation - using the Principles as a guide to widen the scope of the Rights. Although some progress has been made, especially in recent decisions, this avenue still remains under-exploited.

2.4.3 Gradual decline of the extent of social justice bias in the Constitution

The Constitution of Bangladesh, when it first came into operation, declared four Fundamental Principles in the Preamble: nationalism, socialism, democracy and secularism. It was further declared in the Preamble, as we have seen, that it shall be a fundamental aim of the State to realise through the democratic process a socialist society, free from exploitation - a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social will be secured for all citizens. While the social, economic and cultural

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[167] Above note 158.

rights were recognised as Fundamental Principles of State Policy, Article 10 in its original form declared:

> A socialist economic system shall be established with a view to ensuring the attainment of a just and egalitarian society, free from exploitation of man by man.

An important feature of this socialism was its secular nature. As Article 12 said:

> The principle of secularism shall be realised by the elimination of:
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> (a) communalism in all its forms,
>
> (b) the granting by the State of political status in form of any religion,
>
> (c) the abuse of religion for political purposes and
>
> (d) any discrimination against or persecution of, persons practising a particular religion.

Thus the similarity with the Indian Constitution is apparent - a Constitution with strong tendency towards secularism and socialism. In the University of Dacca v. Dr S Hussain,[168] BH Chowdhury J said:

> Revolutions are the locomotives of history and the national liberation struggle is a phase in Democratic Revolution for achieving an egalitarian society where class contractions are eliminated and socialist means of production and distribution is achieved. Our heroic war of liberation was launched in that spirit and the nation was baptised in blood.[169]

The framers of the Constitution, like in India, did not declare any specific ideology or mode of socialism. The Constitution actually envisaged a welfare democracy. It has been argued that with respect to the Preamble of the Constitution of Bangladesh, analogy can not be drawn from communist

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[168] 34 DLR (AD) (1982) 1.

[169] *Ibid.* at 18.

philosophy.[170] The Constitution envisages a traditional democratic process and a Welfare State and its language cannot be construed with reference to a radically different political philosophy. As to the expressions of 'socialism' and 'socialist society', Mahmudul Islam says:

> Apparently these expressions are vague, but the vagueness disappears when we pay attention to the fact that the framers not only used these expressions but also stated the mode of achieving it by using the expression 'through democratic process' and providing in the substantive part of the Constitution a 18th Century tripartite form of government. Read in the proper perspective, there remains no doubt that the framers did not allude to the communist philosophy of State organisation, but conceived of a democratically run welfare State to eliminate inequality of income and status and standards of life, and to provide a decent standard of living to the working mass of the country.[171]

So the term 'socialist society' in the Preamble does not indicate socialism in the sense in which it was practised in the East European countries or in the former Soviet Union.

There was a shift from left to right after 1975 when the ruling party (Awami League) was replaced by General Zia and his party. The scheme of welfare democracy was not altered. But, after the mid-1970s, while India, from a 'sovereign democratic republic' became a 'sovereign socialist secular democratic republic',[172] Bangladesh was moving towards the opposite direction. In the Preamble, secularism was replaced by 'Absolute faith and trust in the Almighty Allah' and the term socialism was substituted by 'socialism meaning economic

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[170] Mahmudul Islam (1995: 46) criticises BH Chowdhury's reliance on the communist philosophy in University of Dacca v. Dr S Hussain above note 168.

[171] Mahmudul Islam (1995: 46).

[172] The Constitution (Forty-Second Amendment) Act 1976.

and social justice'.[173] Article 10 and 12, relating to socialism and secularism respectively, were changed or thrown away.[174] Replacement of the term 'socialism' was an attempt by the new regime to demonstrate its rightist stand. It was also stressed that the aim is more important than the ideology or method of achieving it and that no particular doctrine of socialism is adhered to. Actually, this appears to be a veiled indication that the future chosen path is that of market economy and multi-party democracy.

The right to property is the best example that demonstrates the change.[175] Article 42(2), as originally adopted, provided for acquisition, nationalisation or requisition of property with or without compensation. It was accordingly observed in Md Shoib v. Government of Bangladesh[176] that:

> A socialistic economic system in which instruments and means of production and distribution shall be under the ownership or control of the people is a Fundamental Principle of State Policy.[177]

In 1977, the option to provide for acquisition, nationalisation or requisition without compensation was taken away.[178] As we have seen, in order to give

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[173] This was done in 1977 by the Proclamations Order No.1 and later ratified by the Constitution (Fifth Amendment) Act (No.1 of 1979).

[174] Article 10 now deals with participation of women in national life while Article 12 remains omitted from the Constitution.

[175] Article 13, which remains unaltered, declares the Fundamental Principle relating to ownership. It says that the people shall own or control the instruments and means of production and distribution and with this end in view, three types of ownership are recognised - state ownership, co-operative ownership and private ownership.

[176] 27 DLR (1975) 315.

[177] *Ibid.* at 326.

[178] Proclamations Order No. 1 of 1977.

priority to the collective rights over individual rights, the right to property in India has been deleted from the chapter of Fundamental Rights to elsewhere in 1978.[179] Unlike in India, the right to property is still a Fundamental Right in Bangladesh. But the Parliament has the option, in case of land reform legislation, to declare a particular statute to be made under the protection of Article 47(1). This is to avoid any possible conflict with a judiciary enforcing individual citizen's right to property. Kamal Hossain compares this with India and notes the absence of the long struggle between the legislature and the judiciary regarding land reform legislation.[180]

Our discussion illustrates that the Bangladeshi Constitution, like the Indian one, envisages welfare democracy and contains ample provisions to inspire and direct the Court to embark on social justice issues - there is no major difference in the two constitutions in this regard. But the historical experience of the Bangladeshi Court is different. Also, especially after the Fifth Amendment of the Constitution, the social justice bias seems to be less pronounced compared to the Indian Constitution. Finally, while PIL was being introduced, the Indian Constitution was gradually increasing its socialist tendency. In Bangladesh, on the other hand, it appears that the socialist bias in the Constitution is gradually on the wane due to the efforts of the law makers. The Indian activists focused on

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[179] See above chapter 2.2.2.

[180] Kamal Hossain (1992: 7 and 1997: 48). He observes that, unlike India, in the 1950s, a challenge in the High Court of Dhaka impugning the constitutionality of Zamindari abolition legislation resulted in the Court upholding the validity of such legislation and the Supreme Court had affirmed the judgement of the High Court. See Jibendra Kishor Acharya v. East Pakistan 9 DLR (SC) (1957) 21.

social justice because that was the issue of the day. For the Bangladeshi activists, there was already less emphasis on social justice constitutionally when PIL was about to be introduced.

2.4.4 The place of Islam in the Constitution and its influence on social justice issues

In Pakistan, as we have already examined, Islamic principles are given high status and socio-economic issues, being endorsed and inspired by Islam, have enabled PIL to develop.[181] A comparison with Pakistan is required not only because Bangladesh has a majority of Muslim population but also because it was a part of Pakistan till 1971.

Although the people of Bangladesh are pre-dominantly Muslim, there is a strong tradition of harmony with other religious communities and the religion practised is liberal in outlook.[182] In 1972, the victorious Awami League and its allies clearly opted for a secular system.[183] But subsequently, the Military regimes found it politically expedient to de-secularise the Constitution.[184] Since Islam is a part of the national identity, these changes were generally supported or

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[181] See above chapter 2.3.

[182] Wright (1987: 15-27) believes that the local culture has more influence on Bangladeshi Muslims than it has on the people of other Muslim countries. This is mainly due to the traditional pacifist ideologies of Sufis and hermits who preached Islam in Bengal. See also Banu (1992).

[183] See Maniruzzaman (1983: 184-219) for a comparative analysis of the secular and Islamic trends.

[184] Emajuddin Ahamed (1983: 1114-1119) and Emajuddin Ahamed and Nazneen (1990: 795-808) examine whether this pro-Islamic trend is revivalism or power-politics.

at least tolerated by the general public and protests by the opponents were too weak to stop the process. Even subsequent democratic governments found it unwise to re-secularise - such is the political reality. However the changes brought in the Constitution are cosmetic in nature and nothing like the Pakistani Islamisation process. The secular structure and outlook of the constitutional scheme remains largely intact.

The Constitution of Bangladesh now begins with the words 'In the name of Allah, the Beneficent, the Merciful'. This was inserted in 1977 when the expression 'absolute trust and faith in the Almighty Allah' replaced the term 'secularism' in the Preamble.[185] At the same time, Article 8(1) had the principle of 'absolute faith' inserted and the newly created Article 8(1A) declared the absolute faith principle to be the basis of all actions. Article 12 containing the principle of secularism was omitted. Article 25(2) was inserted directing the State to endeavour to consolidate, preserve and strengthen fraternal relations among Muslim countries based on Islamic solidarity. In 1988, General Ershad inserted Article 2A declaring that the state religion of the Republic is Islam, but other religions may be practised in peace and harmony.[186]

We have seen earlier that the Preamble and the Fundamental Principles, although not enforceable, are very important in the interpretation and application of constitutional and legal rules. Since it has been inserted both in the Preamble

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[185] Proclamation Order No.1 of 1977.

[186] The Constitution (Eighth Amendment) Act (No. XXX of 1988), section 2. Shah Alam (1991: 209-225) provides a critical analysis of the State-religion amendment and argues that the proclamation of Islam as the State-religion is contrary to the democratic and secular commitments of the Constitution.

and the Principles, the 'absolute faith' principle has become very significant.

A number of recent decisions reflect the impact of the 'absolute faith' principle. The issue in Abul Kashem v. Member (Excise) NBR[187] was the consumption of alcoholic and intoxicating drinks and drugs. Direction to prevent such consumption has been provided by the Fundamental Principle under Article 18(1). The Court said that since the insertion of the 'absolute faith' rule, this Fundamental Principle "has undergone a further qualitative change to make such provision more strictly obligatory and mandatory".[188] Accordingly, provision of the Bengal Excise Act (No.V of 1909) and rules made under it were declared void being inconsistent with Articles 7, 8 and 18(1).

This issue was raised in public interest matters as well. In the Kadiani case,[189] the petitioner relied on the 'absolute faith' principle and claimed that since Islam is the State religion he has a right to defend Islam through the injunction of the Court. Similarly, in FAP 20,[190] the petitioner argued, among other things, that the 'absolute faith' principle implies a duty to protect Allah's creation and environment and as such he had standing. In both these cases the Court could not find any specific law in the petitioners' favour.

Recently in Hefzur Rahman v. Shamsun Nahar Begum[191] Gholam

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[187] BCR 1981 HCD 279.

[188] *Id.*

[189] ABM Nurul Islam v. Government of Bangladesh unreported Writ Petition 298/1993 at 4.

[190] Above note 139 at 11.

[191] 15 BLD (1995) 34.

Rabbani J argued that since Art. 8(1A) establishes the 'absolute faith' principle, the indication is that "Qur-anic injunctions shall have to be followed strictly and without any deviation".[192] In this particular case, the Court disregarded the rules laid down by earlier Muslim jurists and commentators and granted post-divorce maintenance to a wife. But the 'absolute faith' principle has not yet been applied to statutory rules or constitutional provisions.

Gholam Rabbani J's argument, if strictly followed, may initiate a whole new process of Islamisation.[193] But this is Islamisation in its liberal form. The aim is to generate creative development of new rules that suit the current socio-legal environment of Bangladesh. So far, the activist stance of Gholam Rabbani J is an exception and not the general trend of the Court.

In spite of the fact that constitutional interpretation is to some extent being influenced by the pro-Islamic provisions, it can not be said the Constitution is Islamic or that the process of 'Islamisation' has started. The fact remains that the 'absolute faith' principle, being in the Preamble and the Principles, is only persuasive and not obligatory or enforceable. Bangladesh is still a Peoples Republic and not an Islamic Republic and the Constitution has not been declared an Islamic Constitution. Article 7 says that all power belongs to the people and the Constitution is the supreme law of the Republic. This is at odds with an

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[192] *Ibid.* at 36.

[193] Malik (1995: 103-125), however, argues that with respect to Muslim family law in Bangladesh, despite the constitutional 'Islamic' character of the state, the judiciary is applying bourgeois-liberal-egalitarian paradigm and not Islamic norms and principles. He also believes that this new trend towards secularisation of the legal system is indicative of an emerging societal consensus concerning the role of religion in state and polity.

Islamic system where the sovereignty belongs to Allah and in case of a conflict between constitutional and Quranic provisions, the latter prevails. Finally, there has been no attempt to Islamise the laws, procedural or substantive, in the Pakistani fashion. The overall scheme as well as the laws still remain secular.

We argue that the Constitution of Bangladesh is a compromise between aggressive secularism and fundamentalist Islam. While it is not Islamic, the Constitution tries hard not to be seen as anti-Islamic. This accommodating stance perhaps reflects the political reality and the liberal attitude towards religion taken by the people. But this makes it unlikely for the Court to expound a concept of PIL that derives its inspiration and validity solely from the Islamic precepts.

2.4.5 Spirit of an autochthonous Constitution: Development of the guiding principle for PIL in Bangladesh

The case that first provided a conceptual groundwork for PIL is the 8th Amendment[194] case of 1989 where it was declared that the Parliament cannot alter the basic structure of the Constitution and decentralise the Supreme Court. This was not a case on social justice, but related to the power relations debate. It came as an inspiration to the judges and lawyers favouring activism and a greater role for the judiciary. The judges declared the need for progressive and dynamic interpretation of the Constitution. They re-affirmed and re-established the principle that while interpreting the Constitution, the intention of its makers and its spirit must be taken into consideration and an Article should not be looked

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[194] Above note 134.

into in isolation.[195] Accordingly, an interpretation requires consideration of the so called 'unique features' of the Constitution of Bangladesh, one of which is its autochthonous nature.[196] BH Chowdhury CJ says:

> . . . our Constitution has proceeded from the people and it is not rhetorical flourish. Our Constitution is not the result of the process of the Indian Independence Act 1947 though we have taken inspiration from the wisdom of the past. Ours is an "autochthonous Constitution".[197]

This line of argument however was not adopted for PIL matters immediately. In 1993, Naimuddin Ahmed J acknowledged the necessity to interpret the Constitution liberally and stressed on socio-economic issues in Welfare Association:

> It must, however, be remembered that the Constitution of a country is not a morbid document but a dynamic instrument capable of being interpreted and applied in the ever-changing socio-economic context of society. The judicial function is to interpret it in such a way as to meet the socio-economic needs of those who are incapable, on account of poverty or otherwise, to seek assistance of the court which exists for safeguarding the rights and interests of all citizens.[198]

The first hint of an emerging Bangladeshi argument in favour of PIL came in the same year from Ishtiaq Ahmed, a leading constitutional lawyer.[199] He argued that a Constitution always carries the spirit of the age and the Constitution

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[195] *Ibid.* at 142 and 194.

[196] *Ibid.* at 109. BH Chowdhury CJ declares 21 'unique features'. Some of these, according to him, are 'basic features' and are not amendable by the mere amending power of the Parliament. Autochthony of the Constitution is placed first in this list.

[197] *Ibid.* at 59.

[198] Bangladesh Retired Government Employees Welfare Association v. Bangladesh (Welfare Association) 46 DLR (1994) 426 at 435.

[199] Syed Ishtiaq Ahmed (1993: 37).

of Bangladesh reflects the historical realities of the time of its creation and contain a vision and dream of the unfolding future. Framers utilised the wisdom of the two decades long experience gained by the Indian and Pakistani Constitutions and enacted a Constitution 'which is distinctively our own'.[200] Then he said:

> The emphasis is relevant and important because it is a cardinal principle of interpretation of a constitution that in interpreting a word or a provision in the constitution the constitution must be read as a whole, every part of it throwing light on the other, every word used deriving its meaning and colour from the total context of the constitution. The preamble and part which follows the preamble, particularly Article 7, the fundamental principles of state policy, the fundamental rights, the scheme of limited government - all these exist not in isolation but as parts of one whole document.[201]

In December 1994, Quazi Shafiuddin J in Parliament Boycott[202] resorted to one of the distinctive features of the Constitution, its autochthonous nature.[203] He observed that Article 7 declares that all powers in the Republic belong to the people and must be exercised on their behalf under the authority of the Constitution which is, as the solemn expression of the will of the people, the supreme law of the Republic. Therefore, a citizen and voter is a member of the whole people of Bangladesh and 'is a source of power along with other citizens of the country'.[204] Since this power is to be exercised under or by the authority of the Constitution, any violation by anybody shall be called in question by each and

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[200] *Id.*

[201] *Id*

[202] Anwar Hossain Khan v. Speaker of Bangladesh Sangsad Bhavan and others 47 DLR (1995) 42.

[203] *Ibid.* at 45-46.

[204] *Id.*

every citizen of Bangladesh. He added a discussion of the Preamble in favour of his argument and pointed out that under the Preamble the people are to safeguard, protect and defend the Constitution.

Parliament Boycott was unique in the sense that it attempted to provide an indigenous theoretical framework without resorting to Indian or Pakistani constitutional arguments. This was instrumental in strengthening the apprehension that attempts to follow other jurisdictions without appreciating the local situation are preventing the success of PIL. Dr Mohiuddin Farooque inferred:

> Public Interest Litigation (PIL) has recently been included in the topical talking judicial agenda (if not propaganda), perhaps, following or being enlightened by the trends in other legal systems and least, quite regrettably, as a principle originating from the aspirations of the land. As a result, some attempts have been made in Bangladesh, often in misplaced and mis-conceived manners in the name of PIL.[205]

He advocated 'autochthonic constitutional litigation' and argued that to build a credible national jurisprudence the functional constitutionalism should be autochthonic.[206] Its spirit is to consider people's rights and public duties. Such autochthonic litigation, he argued, "would consolidate the supreme and sovereign authority of the people instead of disempowering them".[207]

In 1995, Mahmudul Islam re-iterated that an expression occurring in the Constitution cannot be interpreted out of context or only by reference to the

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[205] Mohiuddin Farooque (1994-1995: 1).

[206] The term ACL (autochthonic constitutional litigation) reflects the constitutional and conceptual basis of PIL in Bangladesh, but the phrase did not catch on. The similarity with Baxi's SAL (Social Action Litigation) is interesting to note. See Baxi (1985a).

[207] *Ibid.* at 4.

decisions of foreign jurisdictions "where constitutional dispensation is different from ours".[208] The expression 'person aggrieved' has to be given a meaning in the context of the scheme and objectives of the Constitution. He discussed Articles 7 and 8, Part II and Part III and observed that the spirit and object of the Constitution can not allow a restrictive view of standing.

Again in February 1995, Mahmudur Rahman J in MPs Resignation[209] observed the distinctness of the Bangladesh Constitution, especially from India and Pakistan, and discussed the nature of its autochthony.[210] But since the issue in question was not pleaded in public interest, he did not use this in favour of expounding on PIL.

Thus by 1996, there appeared to be a consensus among activists, leading constitutional experts, lawyers and judges as to the uniqueness of the constitutional scheme, necessity of inclusive interpretation and autochthonic nature inspiring public interest matters. All that was needed was a pronouncement by the highest Court, the Appellate Division, in order to remove the reservations of conservative judges. However, the primary emphasis was not on social justice, secular or Islamic.

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[208] Mahmudul Islam (1995: 512). Mr Islam, a leading constitutional expert and lawyer, is the author of the most authoritative book on the Bangladesh Constitution. While endorsing PIL, Latifur Rahman J cited him and adopted his arguments in FAP 20 above note 139 at 24.

[209] Raufique (Md) Hossain v. Speaker, Bangladesh Parliament and others 47 DLR (1995) 361.

[210] *Ibid.* at 373.

2.4.6 Appellate Division's interpretation in FAP 20

When FAP 20[211] came to the Appellate Division, it was unlikely for the Court to refuse PIL since that would amount to denying the considerable liberalisation achieved in the few preceding years.[212] But the possible extent or method of liberalisation was still a matter of conjecture. The judges, however, were delighted to have a 'proper' PIL case before them and all five concurred in its favour. Except for Rouf J, all of the judges gave separate judgements.

The leading judgement was delivered by Mustafa Kamal J. Earlier in 1991, he refused standing in Sangbadpatra[213] as not being a PIL and in the same case declared that the Indian constitutional position is different and can not be applied to Bangladesh.[214] He further examined this theme in 1994 and was waiting to see "how the Supreme Court of Bangladesh finds its own answer to this issue".[215] In a 1995 lecture, he took pride in the autochthonic nature of the Constitution.[216] The judgement in FAP 20 is a follow up of these ideas.

In FAP 20, Mustafa Kamal J begins with the argument of inclusive interpretation. He states:

> Article 102 of our Constitution is not an isolated island standing above or beyond the sea-level of the other provisions of the Constitution. It is a part of the over-all scheme, objectives and purposes of the

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[211] Above note 139.

[212] For the facts of the case, see *ibid.* at 8-9.

[213] Bangladesh Sangbadpatra Parishad (BSP) v. The Government of Bangladesh 12 BLD (AD) (1992) 153. For the facts of the case and further discussion, see see below chapter 3.4.

[214] *Ibid.* at 155.

[215] Mustafa Kamal (1994: 161).

[216] Mustafa Kamal (1995: 7).

> Constitution. And its interpretation is inextricably linked with the (i) emergence of Bangladesh and framing of its Constitution, (ii) the Preamble and Article 7 (iii) Fundamental Principles of State Policy, (iv) Fundamental Rights and (v) the other provisions of the Constitution.[217]

He then proceeds to discuss each of the five categories separately. Discussing the first point, he denies that the Bangladesh Constitution is just a replica with local adaptations of a Constitution of the Westminster model among the Commonwealth countries of Anglo-Saxon legal tradition. It is not the result of a negotiated settlement with a colonial power or consent or a foreign sovereign. Although it has been amended 13 times, it is not the last of an oft-replaced and oft-substituted Constitution.[218] This Constitution is the fruit of a historic war of independence achieved with the lives and sacrifice of a telling number of people for a common cause, making it a class part from other Constitutions of comparable description. It is a Constitution in which the people feature as the dominant actor:

> It was the people of Bangladesh who in exercise of their own self-proclaimed native power made a clean break from the past un-shackling the bondage of a past statehood and adopted a Constitution of its own choosing. The Constitution, historically and in real terms, is a manifestation of what is called "the People's Power". The people of Bangladesh, therefore, are central, as opposed to ornamental, to the framing of the Constitution.[219]

As regards the second point, the Preamble and Article 7, he again argues that the Bangladesh Constitution stands on a different footing by the very fact of the essence of its birth which is different from others. The people themselves

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[217] Above note 139 at 17.

[218] This clearly is a reference to the Pakistani situation. See above note 103.

[219] Above note 139 at 17.

have adopted, enacted and given themselves a real and positive declaration of pledges reflecting the ethos of the historic war of independence. The pledges in the Preamble indicate the course or path that the people wish to tread. On the other hand, Article 7 makes it clear that all legislative, judicial and executive powers are conferred by the people through the Constitution. The people, again, are the repository of all power.[220]

Regarding the third point, the Fundamental Principles, Mustafa Kamal J says that since Part II shall be a guide to interpretation, it is constitutionally impermissible to leave out of consideration Part II when an interpretation of Article 102 needs guidance.[221] As for the fourth point, regarding the Fundamental Rights, he observes that Article 102 is a mechanism of the enforcement of the Fundamental Rights which can be enjoyed by an individual alone and can also be shared by an individual in common with others when the rights pervade and extend to the entire population and territory. So Article 102(1) can not be divorced from Part III.[222] Finally, regarding the fifth point, the judge observes that the other provisions of the Constitution will come to play their role in the interpretation of Article 102, although their importance may vary from case to case.[223]

Mustafa Kamal J proceeds to say that the people have set out for themselves some objectives, purposes, policies, rights and duties and have strewn

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[220] *Ibid.* at 18.

[221] *Id.*

[222] *Id.*

[223] *Id.*

these over the fabric of the Constitution. Article 102 is an instrumentality and a mechanism by means of which the people aim to realise these constitutional aspirations. He says:

> With the power of the people looming large behind the Constitutional horizon it is difficult to conceive of Article 102 as a vehicle or mechanism for realising exclusively individual rights upon individual complaints. The Supreme Court being a vehicle, a medium or mechanism devised by the Constitution for the exercise of the judicial power of the people on behalf of the people, the people will always remain the focal point of concern of the Supreme Court while disposing of justice or propounding any judicial theory or interpreting any provision of the constitution. Viewed in this context interpreting the words "any person aggrieved" meaning only and exclusively individuals and excluding the consideration of people as a collective and consolidated personality will be a stand taken against the constitution.[224]

This principle, once established, enabled him to allow PIL and set out the detailed rules of standing in public interest matters.[225]

Chief Justice ATM Afzal agreed with Mustafa Kamal J. On the conceptual level, he added a 'theoretical foundation' for environmental PIL. This simple foundation is based, according to him, on Principle 10 of the Rio Declaration which says that environmental issues must be handled with the participation of all concerned citizens at the relevant level.[226]

Latifur Rahman J also agreed with Mustafa Kamal J. But for him, it was the demand of the Constitution to ensure justice, economic and social, that is enough to inspire and validate PIL. He also observed the uniqueness of the

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[224] *Id.*

[225] See below chapter 4.4.5.

[226] Above note 139 at 7. See Robinson and Dunkley (1993) for a public interest perspective in environmental law. The topic has been discussed with reference to the experiences of a number of jurisdictions including India.

Constitutional provisions, and proceeded to argue that the entire Constitution must be considered in the course of interpretation.[227] He discussed the Preamble, Article 7, Part II and Part III of the Constitution and came to the conclusion that the demands of social and economic justice direct the Court to allow public interest matters. Thus he felt no need to resort to a people's power theory. His recognition of the importance of social and economic justice becomes apparent when he says:

> The language used by the framers of the constitution must be given a meaningful interpretation with the evolution and growth of our society. An obligation is cast on the constitutional Court which is the apex court of the Country to interpret the Constitution in a manner in which social, economic and political justice can be advanced for the welfare of the state and its citizens.[228]

As part of his argument, Latifur Rahman J recognised the importance of judicial activism and felt that it is the constitutional duty of the judge to secure Fundamental rights and as such to act when PIL is espoused.[229] The judiciary thus has a vast scope of social engineering.

BB Roy Choudhury J, agreeing with Mustafa Kamal J, found the spirit of the Constitution by discussing the Preamble, Fundamental Principles, Fundamental Rights and Article 102, saying that the meaning of Art 102 must not be understood in an isolated manner.[230] Although he argued in the line of Latifur Rahman J, he stressed less on social justice or judicial activism. He emphasised

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[227] *Ibid.* at 22-24.

[228] *Ibid.* at 24.

[229] *Ibid.* at 25-26.

[230] *Ibid.* at 15.

on the simple fact that the spirit of the Constitution, contained in these provisions, makes it unthinkable that the framers of the Constitution had in mind that the grievance of millions should go un-redressed merely because they are unable to come to the Court. As such, anyone "whose heart bleeds for his less fortunate fellow being' can initiate PIL".[231]

As it appears from the foregoing discussion, the basis of the legitimacy of PIL in Bangladesh is not radically different from the neighbouring jurisdictions. Social and economic justice, as enshrined and mandated by the Constitution inspires and validates a PIL approach. But the distinction lies in the emphasis. While the Indian and Pakistani judges are primarily and overwhelmingly involved with social justice, Bangladeshi judges pronounced less enthusiastically on that theme.

Latifur Rahman J is an exception when he stressed on social justice in FAP 20. But Mustafa Kamal J's judgement is the most important one because it is the leading judgement and there is a conscious attempt to distinguish the Bangladeshi arguments from those of India and Pakistan. The leading judgement, along with the other judgements excepting that of Latifur Rahman J, appears to be little concerned with social or economic justice matters. The reliance is on the autochthonic nature of the Constitution and the supreme place of the people in the constitutional scheme. The 'people's power' theory, especially as interpreted by Mustafa Kamal J, demonstrates the concern of the Bangladeshi judges with respect to the power-struggle between the dominant forces of the society. But as a

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[231] *Ibid.* at 31.

result the primary emphasis is on the 'power of the people' to take part in the power-relations debate rather than social and economic justice for the poor and the deprived.

Chapter 3
Development of cases, issues and activities relating to PIL in Bangladesh

The present chapter analyses in detail the gradual progress of cases, issues and activities relating to PIL in Bangladesh.[1] We attempt to explore the influence of the prevailing constitutional developments on the progress of PIL and the extent to which genuine social and economic justice matters have been advanced through PIL as opposed to frivolous and elitist causes. The analyses includes the respective roles played by constitutional lawyers, activists, voluntary sector organisations and judges.

The chapter aims to demonstrate that the advancement of PIL in Bangladesh is closely connected with the constitutional evolution including democratic and political developments. Absence of democracy and periods of suspension of the Constitution were the main reasons that prevented an earlier beginning of PIL. The constitutional developments were often major in nature. They involved radical changes in the constitutional set-up and transfer of power from autocratic regimes to democratically elected ones.

As a result, on the one hand, the lawyers and judges were not only influenced, but to some extent pre-occupied with this transition to democracy. On the other hand, the élite became busy to re-affirm their share in the political power and, from the very beginning, co-opted the techniques of PIL to further

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[1] The discussion proceeds on a yearly basis. However this compartmentalisation is only for the sake of convenience and is arbitrary. Actually, many cases are heard in one year and the judgement is given in the next.

their own agenda. The result has been a shortage of PIL cases with genuine social and economic justice issues.

3.1 The first few years and the Berubari case (1972-74)

It is very tempting to condemn the Bangladeshi legal system as a colonial legacy in order to explain its shortcomings. But even after gaining independence twice in the last fifty years, the new rulers have kept the system fundamentally unaltered. When the British started to reform, change and eventually transform the legal system inherited from the Mughals, they attempted to import and transplant the common law system and the Anglo-Saxon jurisprudence.[2] In many cases this was compromised because of the difference of society, culture, politics and religion. But essentially, the rulers believed that they were introducing the common law system for the betterment of the colony. In any case, the prime motive was to create a system that would help to rule the colony effectively.

Thus in British India, we had imitations of the British bench and the bar. The lawyers and judges of Indian origin were important and leading members of a new Indian aristocracy created to facilitate the colonial rule. They were not only trained in English law but believed the common law system to be the best and utterly indispensable for the Indian society. It was, therefore, a 19th century colonial legal system, with all its goods and evils which the newly independent nations of India and Pakistan inherited in 1947.

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[2] For a general account of Indian legal history, see Kulshreshtha (1995).

Muslim-dominated East Bengal joined Pakistan and the legal developments in Pakistan and India took two separate roads after 1947. Although in both countries the written constitutions attempted a conscious departure from the colonial mentality, Pakistan was not as successful as India in maintaining democratic practice in the political field.[3] For Bangalis, the Pakistan period was full of clashes and power struggles between different interest groups and especially between the Western and Eastern part of the country. This was made worse by martial laws and the absence of democratic processes. The Constitution was repeatedly abrogated, discarded and written from scratch. A natural healthy development of law was thus frustrated.

The east-west conflict finally resulted in an armed war in 1971. East Pakistan seceded and Bangladesh was born under the leadership of Sheikh Mujibur Rahman, the head of the Awami League, the largest political party.[4] This thus marked the point of departure of the Bangladeshi legal system from that of Pakistan. The new country adopted a Constitution in 1972.

The Constitution of Bangladesh has a chequered history.[5] From the very beginning, it was subject to major amendments which tended to restrictively

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[3] For the constitutional history of Pakistan, see GW Choudhury (1969) and Riaz Ahmad (1981).

[4] Hasan Zaheer (1994) provides a recent account of the birth of Bangladesh. See also AMA Muhith (1992) and Moudud Ahmed (1992).

[5] Mustafa Kamal (1994) sketches the history of the Bangladeshi Constitution from a lawyer's perspective. For a more general analysis of political scientists, see Aleem Al Razee (1988) and Dilara Choudhury (1995).

redefine the limits of Fundamental Rights.[6] One of these early amendments, the Third Amendment,[7] was triggered by Kazi Mukhlesur Rahman v. Bangladesh and another,[8] popularly known as the Berubari case.

On 16 May 1974, the Prime Ministers of Bangladesh and India signed a treaty in Delhi providing *inter alia* that India will retain the southern half of South Berubari Union No.12 and the adjacent enclaves and in exchange Bangladesh will retain the Dahagram and Angarpota enclaves. This treaty was challenged on the ground that the agreement involved cession of territory and was entered into without lawful authority by the executive head of government. The petitioner Kazi Mukhlesur Rahman was an advocate and came to the Court as a citizen and as such his standing was in question.

Locus standi was granted by Sayeem CJ on the ground that Mr Rahman agitated a question affecting a constitutional issue of grave importance posing a threat to his Fundamental Rights which pervade and extend to the entire territory of Bangladesh. The Court decided that the question is not whether the Court has jurisdiction but whether the petitioner is competent to claim a hearing. So the question is one of discretion which the Court is to exercise upon due

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[6] The Constitution (First Amendment) Act (No. XV of 1973) provided for detention and trial of war criminals keeping it out of purview of the provisions relating to Fundamental Rights. The Constitution (Second Amendment) Act (No. XXIV of 1973) inserted provisions for 'Proclamation of Emergency' and suspension of Fundamental Rights during emergency situations. This amendment further qualified Fundamental Rights provisions by including preventive detention laws for the first time in the Constitution.

[7] The Constitution (Third Amendment) Act (No. LCCIV of 1974).

[8] 26 DLR (SC) (1974) 44.

consideration in each case. The application, however, was rejected on the ground of being pre-mature. But since the Court observed that a cession of territory needs parliamentary approval and enactment, the government soon initiated the Third Amendment of the Constitution.

The effect and influence of Berubari is enormous. It has often been considered as the starting point of PIL in Bangladesh where "(T)he Court went very close to the doctrine of public interest litigation".[9] Being the judgement of the Appellate Division, Berubari was resorted and referred to whenever a widening of the standing rule was sought. This case may be regarded as an early achievement of the young Bangladeshi jurisdiction in its attempt to assert its creative authority. This case, it is claimed in FAP 20,[10] is unique since it precedes the PIL developments of the neighbouring jurisdictions. This argument is summed up by Afzal CJ in the same case as he says:

> It is a matter of some pride that quite early in our Constitutional journey the question of *locus standi* was given a liberal contour in that decision by this Court at a time when the Blackburn cases were just being decided in England which established the principle of "sufficient interest" for a standing and the doctrine of public interest litigation or class action was yet to take roots in the Indian jurisdiction.[11]

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[9] Ishtiaq Ahmed (1993: 43).

[10] Dr Mohiuddin Farooque v. Bangladesh and others (FAP 20) 17 BLD (AD) (1997) 1 at 14. Mustafa Kamal J says that an echo of some of the Berubari principles can be found in SP Gupta and others v. President of India AIR 1982 SC 149, a case decided in India eight years after Berubari.

[11] FAP 20 above note 10 at 3.

3.2 The barren period (1975-1986)

The Constitution, which provided for a parliamentary democracy, was under serious threat due to post-war instability, natural calamities including a famine and deterioration of the law and order situation. A desperate ruling party brought the Fourth Amendment of the Constitution in January 1975.[12] This introduced a dictatorial Presidential government with a one-party political system.

The reaction was violent. In August of the same year, President Mujibur Rahman, leader of the liberation struggle and the Awami League, was killed. The government was toppled and a martial law was declared. The Constitution was to remain in force subject to the martial law, i.e. it was partially suspended.[13] The martial law was administered initially by Khondoker Moshtaque, a politician and ASM Sayeem, a retired Supreme Court judge. But the real power was in the hands of the army. The Chief of the army, General Ziaur Rahman, eventually became the martial law administrator. He gradually formed his own political party and decided to run the country as an elected President. By the time this martial law gradually gave way to a civil government in 1979, a multi-party democratic system had taken shape due to systematic dismantling of the Fourth Amendment.[14]

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[12] Act No. II of 1975.

[13] Bari (1987: 35-51 and 1989: 59-73) discusses in detail the restrictions imposed upon the judiciary by the martial law and concludes that the judiciary had very little room left to manoeuvre.

[14] These changes brought by various Martial Law Proclamations were later ratified by the Constitution (Fifth Amendment) Act (No.1 of 1979). Although many of the autocratic provisions, including some of the unfettered powers of the President, were taken away, it still remained a Presidential system.

The civil government, which lasted till 1982, was dominated and controlled by Zia. Still, the political and legal environment was comparatively free and the Court started to give a series of bold and significant decisions.[15] But this was again interrupted when, after the assassination of Zia in a failed *coup dé état,* the new elected President was removed by General Ershad in March 1982.

Under the new martial law the Constitution was suspended altogether. A mini-Constitution was inserted in the Schedule to the Martial Law Proclamation which was to govern the country. Again, the Court was rendered inactive as this new device "quietened the legal front effectively".[16] General Ershad followed General Zia and after forming his own political party, started to transform himself as a political leader. Eventually, martial law was withdrawn in 1986, but the system remained basically an autocratic one.

The constitutional journey in the first 15 years shows that the Court did not have an opportunity to function properly, let alone allow for the development of new ideas and views under the martial law regimes. The Berubari principle could have marked the turning point in the Bangladeshi jurisdiction for carrying forward the movement of PIL, notes Ishtiaq Ahmed, but the process was thwarted when the Constitutional order was disrupted.[17] Mustafa Kamal J explains in FAP 20:

> What happened after Kazi Mukhlesur Rahman's case in Bangladesh

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[15] Mustafa Kamal (1994: 84) charts and discusses a number of significant constitutional cases from this period, but there is no PIL or PIL-like case.

[16] *Ibid.* at 86. See also Mutaleb (1986: 42-45) for a short account of the state of judicial independence under Ershad's martial law.

[17] Ishtiaq Ahmed (1993: 44).

> was a long period of slumber and inertia owing not to a lack of public spirit on the part of the lawyers and the Bench but owing to frequent interruptions with the working of the Constitution and owing to intermittent de-clothing of the constitutional jurisdiction of the superior Courts.[18]

Kept inactive and helpless, the Court's strategy was best described by Justice MH Rahman:

> In some of the developing countries the very existence of judiciary as an institution is at stake. In that unenviable condition the primary role of a judge will be, if he does not decide to leave his post, to hold on. If he fails to roar like a lion it is understandable. If he keeps a glum face and gives a withering look then that will be a good work. For the time being the worthwhile role for him will be to do justice between a citizen and a citizen, so that a foundation may be laid for the future when a citizen will be able to expect justice against the mighty and the overbearing as well.[19]

A significant case from this period is AK Mujibur Rahman v. Returning Officer and others.[20] General Ziaur Rahman was a presidential candidate while still being a member of the Armed Forces. Military laws were amended to facilitate his candidacy. This amendment was challenged by a voter. The petition was summarily rejected by Shahabuddin Ahmed J on merit but the question of standing was not disputed.

Standing was discussed in MG Bhuiyan v. Bangladesh[21] where an advocate challenged an Ordinance as a citizen. As he was not personally affected, Munim CJ denied standing following the traditional view.

Indian developments of the early 1980s had not had any noticeable effect

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[18] Above note 10 at 15.

[19] MH Rahman (1988: 4-5).

[20] 31 DLR (1979) 156.

[21] BCR 1981 (AD) 80. This was an appeal from MG Bhuiyan v. Bangladesh BCR 1982 HCD 320.

in Bangladesh by this time. At least there is no judgement that sheds any light in this regard.[22] It appears that the judges were still wrapped in the traditional restrictive ideas of standing and public interest. In a 1987 Conference of judges, MH Rahman J discussed Bhagwati J's achievements but was very sceptical in following him.[23] PIL was, in general, an unknown concept.

However, the modern legal aid movement can be traced back to this period. In 1978, the Madaripur Legal Aid Association was established. It was the first village-based and grass-root legal aid organisation of Bangladesh.[24] This association not only spread the idea of legal rights of the poor but gradually came to assist public interest activists.

3.3 Beginning of public interest cases (1987-1990)

After the withdrawal of martial law, from 11th November 1986, the Supreme Court started functioning with respect to its original writ jurisdiction.[25] General Ershad's democracy was controlled and guided, elections were held but failed to

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[22] Exceptionally, an editorial of the BCR Journal (1987b: 3-4) appealed for PIL and stressed on learning from the Indian experience. No other legal writing of the time deals with PIL.

[23] MH Rahman (1988: 1-10) appears to appreciate the activist role played by Justice Bhagwati, but refuses to follow him on the traditional ground of non-interference in political matters and economic non-viability of the implementation of social justice pronouncements of the Court.

[24] Alimuzzaman Chowdhury (1987: 21-23) traces the early years of this association and terms its activities as an attempt for 'collective legal self reliance'. See also Chambers et al. (eds.) (1992: 26-32) for history, organisation and achievements of this association.

[25] The Constitution (Seventh Amendment) Act (No. I of 1986) ratified the Martial Law of Ershad.

ensure the legitimacy he desired. The limited democratic practice, however, gave the Court some opportunity for a more active role. In 1988, the Eighth Amendment[26] made Islam the state religion and decentralised the higher judiciary.[27] This decentralisation was successfully challenged in the Court and gave rise to one of the most important of all post liberation judgements.

In Anwar Hossain Chowdhury v. Bangladesh (8th Amendment case)[28] the amended Article 100 of the Constitution was challenged as *ultra vires*. The Court, by a majority judgement of three against one, declared that the basic structure of the Constitution can not be altered and as such the amendment is void.[29] The Court not only confirmed its power of judicial review, it proceeded to discuss many aspects of constitutionalism in Bangladesh and judicial activism. In this judgement the principle of the supremacy of the Bangladesh Constitution, the validity and authority it derives from its autochthony and the imperative nature of its dynamism were established.

The judgement was a severe blow to Ershad's authority and enhanced the prestige of the Court enormously. It was also a reference for judges in future

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[26] The Constitution (Eighth Amendment) Act (No. XXX of 1988).

[27] Shah Alam (1991: 209-225) analyses the state religion amendment. As regards decentralisation, see DLR editorial (1987a: 1-14) for a critical legal analysis.

[28] 1989 BLD (Spl.) 1; 41 DLR (AD) (1989) 165.

[29] The Court followed the Indian epoch-making decision of Keshavananda v. State of Kerala AIR 1973 SC 1461. However, it was pointed out in the 8th Amendment case above note 28 at 168, that the basic structure doctrine was not first discovered in Keshavananda. This doctrine has been recognised in other jurisdictions from long before, including the Dhaka case of Fazlul Quader Chowdhury v. Mohammad Abdul Hauqe PLD 1963 Dac SC 463; 18 DLR (SC) (1963) 69. This decision was later cited in the famous Indian case of Sajjan Singh v. State of Rajasthan AIR 1965 SC 845.

whenever the authority of the judiciary was to be decided *vis-á-vis* other governmental organs. As such this case is believed to be a forerunner of PIL cases.[30]

Defying Ershad's autocratic regime, concerned citizens started coming to the Court with their petitions. The first group of petitions came in the nature of *quo warranto*, since such a proceeding does not require the petitioner to have a personal grievance. The position of *quo warranto* petitioners was strengthened in M Mostafa Hossain v. Sikder M Faruque and another,[31] where BH Chowdhury CJ reaffirmed that in a writ of *quo warranto* challenging authority of a person holding public office, any citizen, irrespective of personal grievance can come to the Court.[32] In that case, the Court even rejected a compromise petition on the ground that a matter of great public interest was involved.

In Saiyid Munirul Huda Chowdhury v. AKM Nurul Islam[33] an advocate challenged the appointment of the Vice President of Bangladesh on the ground that he formerly held the office of Chief Election Commissioner and as such Article 118(3)(a) of the Constitution disqualifies him for a 'service of the

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[30] Mahmudur Rahman (1992: 5 and 1997: 83-84).

[31] 7 BLD (AD) (1987) 315. This was an appeal from M Mostafa Hossain v. Sikder M Faruque and another 7 BLD (1987) 53.

[32] For a more detalied discussion, see below chapter 4.6.

[33] 1 BLC (1996) 437. This 1987 case was reported after nine years when interest in the issue revived after another citizen challenged the appointment of the President in Abu Bakar Siddique v. Justice Shahabuddin and others 1 BLC (1996) 483; 17 BLD (1997) 31. In a comparable case, parliament members in India challanged the election of President Dr Zakir Hossain on the ground of constitutional disability in Baburao Patel v. Dr Zakir Hossain AIR 1968 SC 904.

Republic'. MS Ali J held that the office of the Vice President is excluded from the category of person holding an 'office of profit in the service of the Republic' and summarily dismissed the petition.

In another *quo warranto* matter, M Saleem Ullah v. Justice Mohammad Abdul Quddus,[34] an advocate challenged the appointment of a Supreme Court Judge in the post of Joint Secretary in the Ministry of Law as violative of the Constitution. AMK Chowdhury J decided that the appointment was valid but only because it was protected by a Martial Law Proclamation.[35]

In 1988, the Young Lawyers Forum (*Jubo Ainjibi Forum)* initiated KM Zabir v. Amanullah and others.[36] The petitioner claimed that the soft drink company Pepsi had violated the law by resorting to lottery techniques.[37] Claimed by the Forum to be the first of its kind, the case was fought in the name of PIL and won. The Court even awarded cost to the association since they had 'fought the case on behalf of the whole country'.[38]

For the first time during this period, we see a number of lawyers forming into groups and attempting to fight *pro bono publico* cases. Justice Quddus

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[34] 46 DLR (1994) 691.

[35] Martial Law Proclamation of 24/3/1982. This was later amended by the Proclamation (First Amendment) Order (No. 1 of 1982) and the Proclamation (Amendment) Order (No. 1 of 1983).

[36] Unreported CMM Court Dhaka Case No. 1097A1/88.

[37] In 1965, Section 294B was inserted in the Penal Code 1860 making any offering of prize in connection with trade an offence punishable with six months imprisonment, or fine, or with both. This appears to be an attempt to defend anti-gambling principles of Islam.

[38] Above note 36 at 2.

Chowdhury's case was the first where M Saleem Ullah and his friends appear before the Court as concerned citizens. Over the years they brought a considerable number of constitutional cases and subsequently formed the Association for Democratic and Constitutional Advancement of Bangladesh (ADCAB).[39] On the other hand, the Young Lawyers Forum did not pursue their initial success by filing more public interest cases, perhaps because promoting PIL was not its main purpose. But the reason Pepsi remained relatively unimportant was due to the fact that it was fought in a Magistrate Court, the judgement having no force of judicial precedent.

However, these cases dealt mainly with the political rights of the applicants. Even in the few cases where the subject matter is not political, they represent concerns of the middle classes rather than those of the poor or the socially deprived.

3.4 Misconceived attempts (1991)

By 1990, the movement for democracy gained momentum. General Ershad resigned on 4 December, 1990. He was arrested and the then Chief Justice Shahabuddin Ahmed headed an interim government. Although indirectly, this increased the prestige of the judiciary.

Since, under the Constitution, an election was required to be held within 180 days for the vacant posts of President and Vice President, in M Saleem Ullah

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[39] MI Farooqui and Mohsen Rashid are other founding members of ADCAB.

v. Election Commission and another,[40] an attempt was made to compel the Election Commission to proceed with an election. This writ was kept pending.

The election, which was free and fair, was conducted by Justice Shahabuddin's government. This was won by the Bangladesh Nationalist Party (BNP) headed by Khaleda Zia, the widow of General Ziaur Rahman. The Eleventh Amendment[41] of the Constitution ratified Justice Shahabuddin's interim government while the Twelfth Amendment[42] in September 1991 restored the parliamentary system of government. Due to these amendments, Saleem Ullah's case became infractuous. The Twelfth Amendment was a major one and again changed certain features of the government declared in 1989 to be basic in the 8th Amendment case. From now on, the Parliament operated under full democracy and there was no shadow of a dictator.

In this year came Bangladesh Sangbadpatra Parishad v. The Government of Bangladesh.[43] The government had constituted a wage board for fixing the wages of newspaper employees. An association of newspaper owners challenged the Constitution of the wage board and its authority and pleaded PIL. In the Appellate Division, Mustafa Kamal J refused standing on the ground that the applicant was not a 'person aggrieved'.[44] It was also pointed out that the

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[40] Unreported Writ Petition 633/91.

[41] The Constitution (Eleventh Amendment) Act (No. XXIV of 1991).

[42] The Constitution (Twelfth Amendment) Act (No. XXVIII of 1991).

[43] 12 BLD (AD) (1992) 153. This was an appeal from Bangladesh Sangbadpatra Parishad v. The Government of Bangladesh 43 DLR (1991) 424.

[44] This case has been discussed in more detail from the perspective of the standing of the applicant in chapter 4.4.2.1 below.

Indian PIL decisions are not applicable since the Indian constitutional provisisons are not similar to the Bangladeshi ones.

The effect of this pronouncement by the Appellate Division was perhaps greater than anticipated. Sangbadpatra was not a PIL case. If it had been, the decision of the Court could have been different. The judge said:

> The petitioner is not espousing the cause of a downtrodden and deprived section of the community unable to spend money to establish its fundamental rights and enforce its constitutional remedies. It is not acting *pro bono publico* but in the interest of its members.[45]

This indication was noticed from the very beginning by a number of commentators. In 1992, Mahmudur Rahman regretted that the Court was unduly conservative, but realised that it was not a PIL case.[46] Similarly Ishtiaq Ahmed in his analysis of Bangladeshi PIL cases, does not include Sangbadpatra.[47] In 1994, delivering a lecture in Dhaka University, Mustafa Kamal J gave even clearer approval in favour of PIL.[48] But still, the indication given in Sangbadpatra in favour of PIL was not clear enough for the judges and the majority of the lawyers to detect.

The judges of the High Court Division created the impression that since the Constitution of Bangladesh does not have provisions similar to the Indian one, there is no scope for PIL. Also, the use of the term 'a phrase which have received a meaning and a dimension over the years' caused widespread confusion

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[45] *Ibid.* 156.

[46] Mahmudur Rahman (1992: 5-6 and 1997: 84).

[47] Ishtiaq Ahmed (1993: 36-45).

[48] Mustafa Kamal (1994: 159-166).

at a time when very few of the lawyers and judges had any real idea or understanding about this new concept.[49] This judgement for them meant that there can be no departure from the traditional view. Sangbadpatra is thus a perfect example where attempts by a previleged group to use the techniques of PIL have actually damaged the movement for cases with genuine concern for social justice.

3.5 Heightening of the consciousness of PIL (1992)

In the political arena, 1992 was a year of calm when the newly earned democracy started to function. The most significant PIL cases in this year related to personal liberty matters.

Anwarul Hoque Chowdhury J in Ayesha Khanam and others v. Major Sabbir Ahmed and others[50] expanded the traditional *habeas corpus* principle by giving standing in a case of private detention.[51] The petitioner was a mother seeking custody of her child. *Bangladesh Mohila Parishad*, a voluntary organisation, fought successfully as a party.

Hatem Ali, a man aged 104, was released from prison this year as a result

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[49] Ishtiaq Ahmed (1996: 5) analyses in detail the intricacies of this confusion. He argues that in different types of writs, the phrase has different meanings and in cases of constitutional fundamental rights, the common law rules developed in England do not apply. For a detailed analysis, see below chapter 4.4.3.

[50] 46 DLR (1994) 399.

[51] This law has recently been followed in Sharon Laily Begum Jalil v. Abdul Jalil and others 48 DLR (1996) 460. In this case, the mother was held competent to seek *habeas corpus* when her husband kidnapped the children.

of investigative journalism.[52] Arrested in 1978, he was accused of five criminal cases but was convicted of none. In a similar case, Falu Mia was released after 21 years in prison.[53] He had been convicted of crime, but overstayed in the prison for six years due to administrative callousness. The newspapers again played the leading role.[54]

Since the government responded promptly, there was no reason for Hatem Ali or Falu Mia to come to the High Court. A precedent on PIL was to be set in State v. Deputy Commissioner, Satkhira and others, known as Nazrul Islam's case.[55] Nazrul Islam had been held in prison for 12 years without any trial. Justice MM Hoque noticed a newspaper reporting this news, initiated the criminal miscellaneous case *suo moto* and released Nazrul.[56]

In all these cases, we see co-operation among journalists, NGOs, judges, lawyers and the administration. The most important role was played by the journalists who were using the full potential of the newly found freedom of speech. As soon as these reports were published, they provoked strong public

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[52] This incident received considerable media coverage. For a full version, see the report in Boyoska Punorbason Kendra Bulletin (October 1993: 9) under the title "কে ফিরিয়ে দেবে হাতেম আলিকে ১৪টি বছর?" (Who will bring back 14 years of Hatem Ali's life?).

[53] State v. Falu Mia unreported Savar PS 5(8)92 and 12(4)92. Criminal Misc. 1755/1993.

[54] See for example, the Vorer Kagoz (15/11/93: 1) under the caption "ফালু মিয়া জানে না কেন তার ২১ বছর জেলে কাটলো (Falu Mia does not know why he has spent 21 years in prison)".

[55] 45 DLR (1993) 643.

[56] This was another brilliant piece of journalism by the Ittefaq (6/10/92: 1) published under the caption 'সব মামলা হইতে অব্যাহতি, অথচ বারো বছর যাবত জেলে' (Acquitted from all charges, but in prison for 12 years).

reaction and criticism of the law enforcement agencies. In Hatem Ali, a Government Minister became involved, in Falu Mia an NGO came forward.[57] The Court praised the co-operation of journalists and government officers in Nazrul Islam.[58] This case was not only the first *suo moto* case of this kind by the High Court, it was also bold in the way it criticised law enforcement agencies and the directions it gave for further investigation into similar cases. On the whole, these cases demonstrated the power of PIL and the prestige it can give to the Court. It was difficult for law professionals to remain ignorant of these newly emerging public interest issues. As these personal liberty cases involved genuine and serious violation of Fundamental Rights, the Court was not hesitant to resort to a liberal approach.

However the success in detention cases was offset by failures in some other cases involving elitist causes where the applicants claimed that they were protecting their rights as concerned citizens. In Syed Mahbub Ali and others v. Bangladesh[59] a number of subordinate court judges were promoted without consultation with the Supreme Court. This was challenged by a group of practising advocates as 'concerned citizens'. Relying on Sangbadpatra, Abdul Jalil J held that they had no *locus standi*.

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[57] Home Minister Mr Abdul Matin Chowdhury took personal interest in Hatem Ali. Since Hatem Ali had no relatives, after release, he took shelter with an NGO - The Center for the Rehabilitation of Aged Persons (বয়স্ক পুণর্বাসন কেন্দ্র). Falu Mia was assisted by the Bangladesh Human Rights Implementation Organisation (বাংলাদেশ মানবাধিকার বাস্তবায়ন সংস্থা).

[58] Above note 55 at 650.

[59] Unreported Writ Petition 4036/1992; later Appeal 317/1993.

Similarly, another failure was Dr Ahmed Hussain v. Bangladesh.[60] In this case, an advocate was given standing to challenge the reservation of seats for women in the Parliament as anti-constitutional.[61] But MH Rahman J held that the case itself had no merit.[62]

The steady increase of the involvement of lawyers' groups and voluntary sector organisations was further boosted when in October 1992, a two-day seminar on PIL titled 'Rights in search of remedies' was held in Dhaka.[63] The initiative was taken by two voluntary associations: the Madaripur Legal Aid Association and *Ain O Shalish Kendra*. Eminent jurists, judges and lawyers from India and Pakistan joined their Bangladeshi counterparts and exchanged views. Wide presence and participation from the bench and the bar made it a very successful venture. For the first time, PIL became an issue in the discourse of Bangladeshi law. For a relatively close-knit legal community, this single seminar did more than anything else to popularise the idea of PIL and 'visibly created

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[60] 44 DLR (AD) (1992) 109.

[61] For a detailed discussion of the point of law, see below chapter 5.2.1.

[62] A similar question was raised in Fazle (Md) Rabbi and others v. The Election Commissioner 44 DLR (1992) 14. The Court observed that there is nothing anti-constitutional in reserving parliamentary seat for women. See Article 10 of the Constitution containing the Fundamental Principle that the government shall take steps to ensure participation of women in all spheres of life. Article 12 provides an exception to the Fundamental Right of non-discrimination enabling the State to make special provisions in favour of women as a backward section of citizens.

[63] The papers from this seminar has recently been published, see Hossain *et al.* (1997).

immense interest particularly in the legal circle'.[64] Senior Advocate Ishtiaq Ahmed observed:

> An international seminar recently held in Dhaka and attended by jurists from India and Pakistan including the Chief Justice of Pakistan and attended by our legal and judicial luminaries, younger generations of lawyers and students of law, has left behind a salutary impact on our minds regarding the philosophy and jurisprudence of this class of litigation.[65]

3.6 Fighting the threshold problem: Limited success through technical innovations (1993)

Use of the techniques of PIL by the political activists continued in 1993. A highly political issue came for the determination of the Court in the Kadiani case.[66] The petitioner, advocate Nurul Islam, claimed to be a 'concerned citizen' and Muslim. He held important posts in several religious organisations. The Court was asked to compel the government to declare the members of the Kadiani sect non-Muslims. Abdul Jalil J decided that the government has no authority to determine whether or not a particular sect is non-Muslim.[67] However, standing was given and a *prima facie* case was recognised. Special interest religious groups almost

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[64] Editorial comment in Amir-ul Islam (1993: 6). The editors also declared support and commitment to PIL from the DLR Journal which was significant since DLR is the leading law reporter in Banglandesh.

[65] Ishtiaq Ahmed (1993: 44).

[66] ABM Nurul Islam v. Government of Bangladesh unreported Writ Petition 298/1993.

[67] The petitioner relied on Pakistani laws where the Kadianis are considered non-Muslim. But the Court refused to follow Pakistani cases and pointed out that Bangladesh has no law akin to the Anti-Islamic Activities of Kadian Group, Lahori Group and Ahmadias (Prohibition and Punishment) Ordinance (No.XX of 1984).

succeeded in using PIL to further their political agenda.

Continued democratic and political stability combined with increased activism from the Court gave rise to a number of consumer cases where the petitioners were more successful. In Tabani Beverage,[68] like the 1989 Pepsi case, a form of lottery was declared by a beverage company without seeking permission from the government as is required under the law. This was successfully challenged in the lower courts. Bangladesh Legal Rights Trust (বাংলাদেশ আইন অধিকার ট্রাস্ট) filed the civil case while the criminal case was brought by the Committee for the Protection of Lawyers' Rights (আইনজীবী অধিকার সংরক্ষণ পরিষদ). One can perhaps detect a competitive mood for media attention here.

The Committee for the Protection of Lawyers' Rights initiated another consumer case. The petitioner in M Ali Akand v. Shamsul Islam and others[69] came as a concerned and affected citizen and challenged a company selling certain Indian-made soap representing that it was made in Bangladesh. The case is still pending.

Since these cases were fought in the lower courts, their effect on the development of PIL is minimal. The opportunity to get a High Court ruling for PIL came in the Paracetamol case.[70] A journalist, being a father of a child of four,

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[68] Bangladesh Ain Odhikar Trust v. Tabani Beverage & others, (Civil) 2nd Assistant Judge Court, Dhaka, TS 324/93. M Sultan Uddin v. M Fazlul Hoque (criminal) Dhaka CR case No. 2739/93. Later, a writ was filed on the same issue, but this was done by a rival beverage company and no public interest was claimed.

[69] Unreported Dhaka CR Case 1721/1993.

[70] Syed Borhan Kabir v. Bangladesh and others unreported Writ Petition 701/1993.

hoped to compel the government to perform its duty to monitor the production of toxic Paracetamol syrup which was causing death to infants.[71] But before any judgement could be pronounced, the medicine was withdrawn from the market under the direction of the government. This prompt action rendered the case infractuous.

These consumer cases, except for the Paracetamol case, had rather weak public interest elements. Although these were the first batch of consumer cases fought in the name of PIL, none of these cases were pursued by consumer associations or other organised citizen's rights groups. The young lawyers pursued less than well-researched briefs. The efforts were not only random, but mainly targeted middle-class concerns. The only genuine public interest issue was involved in the Paracetamol where the opportunity to get a judgement in favour of PIL was lost due to prompt governmental action.

A genuine issue concerning the poor was raised in the Slum Dwellers case.[72] When Mirpur area slum duellers were ordered to vacate government lands within 24 hours, public-spirited lawyers helped a destitute old lady to claim that she must not be removed unless the government provides her with an alternative home. The Court's rejection of the plea that she has a right to stay or be alternatively provisioned was seen by the lawyers as a denial of PIL. However,

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[71] BELA Newsletter (Vol 1:1, p. 5) claims that in 1992, 230 infants died as their kidneys failed due to toxic Paracetamol syrup. Instead of using PROPYLENE GLYCOL, the companies were using DI-ETHYLENE GLYCOL which is cheaper but toxic.

[72] Rokeya Khatun v. Sub-Divisional Engineer and others unreported Writ Petition 1789/1993.

the Court maintained the *status quo* for quite a long time, practically giving ample time to the slum duellers to make alternative arrangements.

A pronouncement in favour of PIL finally came in Bangladesh Retired Government Employees Welfare Association and others v. Bangladesh.[73] An association for retired government employees sued, challenging discrimination on pension matters. This was recognised as a matter of public interest. Naimuddin Ahmed J said:

> . . . the petitioner No.1 is an association for looking after the welfare of the retired government employees and the question of pension of the retired government employees is a question in which the common interest of all retired government employees are involved and, as such, to our view, it is an absurd proposition to suggest each individual pensioner to come forward and file a separate writ petition vindicating a common right. There is no doubt that since the petitioner No.1 looks after the common interests of all retired government employees it is entitled to ventilate this interest before this Court in the form of public interest litigation.[74]

This judgement, however, can not be said to have established complete public interest standing. Even though the standing of the association was in question, other petitioners, i.e. the pensioners, were personally aggrieved and had clear standing. Also, instead of granting standing to an association as a matter of principle, the Court relied on the fact that this particular association is of such a type that it is, under operation of various laws, a 'person' and thus capable of bringing a petition.[75] This case involved a particular interest group as opposed to the public in general. Finally, the Court avoided the Sangbadpatra principle by

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[73] 46 DLR (1994) 426.

[74] *Ibid.* at 434.

[75] *Id.* For further discussion on this issue, see below chapter 5.3.1.2.

pointing out that the facts of the two cases are different. So, this being a judgement of the High Court Division, the weight of the Appellate Division judgement in Sangbadpatra remained intact.

Welfare Association case was an important development in the process of recognition of PIL in Bangladesh. Discrimination of retired government employees on pension issues was considered as a matter of public interest. The element of public interest does not speak very strongly of social justice in the sense that it deals with the concerns of the middle class, not of the socially deprived or the poor. But a favourable judgement could be given because no political or frivolous cause was advocated.

3.7 New wave of PIL attempts: Gaining more grounds (1994)

Although a considerable number of cases were filed as PIL in 1994, they fall into two broad categories. The first type involved political issues while the second type dealt with environmental and consumer concerns.

3.7.1 Political issues as PIL cases

From 1 March 1994, the opposition parties started to boycott sessions of the Parliament. Their first complaint was against a supposedly slanderous statement made by a government minister in Parliament. But after a highly controversial parliamentary by-election, they continued the boycott on the demand of a caretaker government. This proposed non-party government, they explained, will run the country in times of parliamentary elections, eliminating the possibility of

vote-rigging. This demand gained popular support and was accompanied by demonstrations, processions, picketing and frequent nation-wide strikes.

The boycott was challenged by a political activist supporting the party in power. Public interest standing rule was successfully used as he approached the Court as a 'citizen and voter'. This was Anwar Hossain Khan v. Speaker of Bangladesh Sangsad Bhavan and others,[76] popularly known as the Parliament Boycott case. He sought to enforce his fundamental right of being represented in the Parliament. Quazi Shafiuddin Ahmed J said:

> As Constitution is a solemn expression of the will of the people, the supreme law of the Republic, any violation by anybody including the members of the Parliament shall be called in question by each and every citizens of Bangladesh.[77]

Since the Constitution is of revolutionary origin and derives its validity and power from the people, *locus standi* can not be denied if the people come forward to 'safeguard, protect and defend the Constitution'. The Court also noted the Berubari[78] principle that in questions of grave constitutional importance, any citizen can come to the Court. The Parliament members were ordered to return to the Parliament.

This decision, given on 11 December 1994, caused a huge uproar and the opposition parties criticised the judge as biased.[79] They quickly went on appeal.

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[76] 47 DLR (1995) 42.

[77] *Ibid.* at 46.

[78] Above note 8.

[79] The political situation generated such intense feelings that a number of leaders indicated defiance of the judgement. Their extremist followers even bombed the judge's house, but nobody was injured. See the Bangladesh Observer (12-13-14/12/1994).

The Appellate Division, perhaps worried not to politicise the Court unreasonably, stayed the order of the High Court Division till disposal of the matter and resorted to the tactic of delaying a disposal. Soon, on 28th December, the opposition members resigned *en masse* and the appeal became infractuous.

Parliament boycott raised several problems for the movement for PIL. Although public interest standing was recognised, this case was too much politicised to become a good precedent for PIL. Controversy and media attention made the judges more cautious and they were under pressure not to show too much activism with respect to public interest standing. Also, the Appellate Division's reluctance to face the problem resulted in the lingering of the bad effect of Sangbadpatra.

Another problem of Parliament boycott was that it gave the impression that political activists, being able to disguise as 'concerned citizens', could be granted standing to raise their preferred political debate in the judicial arena. In fact, PIL was soon used by the political activists in a number of cases.

In Md Kafiluddin v. Maulana Syed Fazlul Karim and another[80] it transpired that a religious leader had declared in a public gathering that anyone not a fundamentalist is a bastard, not a Muslim. Md Kafiluddin, an advocate, claimed that this statement injured the religious feelings and belief of the public. This case is still pending.

M Saleem Ullah, in the Haiti Troops case,[81] challenged the decision of the

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[80] Dhaka CMM Court, Petition Case No. 1998/1994.

[81] M Saleem Ullah v. Bangladesh 47 DLR (1995) 218.

government to send peace troops to Haiti under UNO supervision without seeking approval from Parliament. The petitioner's standing was not discussed, but Mahmudur Rahman J rejected the petition on merit and also expressed his unwillingness to deal with policy matters.

Mr Saleem Ullah continued his assault on the government with a number of *quo warranto* cases. In the Justice Sultan Hossain case,[82] the question was whether an ex Chief Election Commissioner can be appointed as chairman of the Press Council. The matter is pending. In the Settlement Court Judges case,[83] the eligibility of two judges was challenged. The government swiftly removed both of them and the case became infractuous.

In Md Idrisur Rahman v. Shahiduddin Ahmed and others,[84] an advocate claimed that the appointment of the CMM (Chief Metropolitan Magistrate) without prior consultation with the Supreme Court was unconstitutional. This is another case that is still awaiting hearing.

In Chairman, Civil Aviation Authority of Bangladesh v. Kazi Abdur Rouf and others,[85] a headmaster's attempt to question the formation of the managing committee of a school was held not a case *pro bono publico*.

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[82] M. Saleem Ullah v. Justice Sultan Hossain Khan unreported Writ Petition 990/1994.

[83] M Saleem Ullah v. Md Aminul Islam, Chairman, Court of Settlement No.1 unreported Writ Petition 245/1994 and M Saleem Ullah v. Khondoker Badruddin, Chairman, Court of Settlement No.2 unreported Writ Petition 820/1994. The point of law was whether the government can appoint a retired district judge when the statute provides for a person who is either a district judge or competent to be so.

[84] Unreported Writ Petition 1381/94.

[85] 46 DLR (AD) (1994) 145.

In all these cases, the lawyers fought for the political rights of the privileged few rather than social and economic justice for the poor. The general failure of these cases demonstrates that the Court either doubted the elements of public interest or the intentions of the applicants. It is significant that in these cases the lawyers litigated as PIL applicants.

3.7.2 Environmental and consumer issues

Sangbadpatra adversely affected a very important environmental case in 1994. The Bangladesh Environmental Lawyers Association (BELA) had been active since 1991. After its initial period of organisation and groundwork, it started initiating test litigation in the public interest. Led by Dr Mohiuddin Farooque, almost all the cases fought by BELA are well-researched, have genuine public or citizen's interest involved and are methodically and relentlessly pursued. Above all, this association is the first to have resources and skill to combine other public interest law activities such as lobbying and negotiation with litigation.

However, relying on Sangbadpatra, standing was rejected by Ismailuddin Sarkar J in Dr Mohiuddin Farooque v. Bangladesh / Sikandar Ali Mondol v. Bangladesh.[86] The Flood Action Plan 20 (FAP 20) of Tangail, claimed BELA, would adversely affect more than a million human lives and natural resources including flora and fauna. Also, the plan ignored participation of the local people. But BELA was held not aggrieved.

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[86] Unreported Writ Petition 998/1994 and 1576/1994.

Another attempt was made in the Industrial Pollution case,[87] where the government and a number of industries were asked to control unchecked pollution. This case is still pending. BELA also failed to win on merit in Bangladesh Environmental Lawyer's Association v. Election Commission & Others.[88] The claim was that during the City Corporation elections, posters, loudspeakers etc. were polluting the environment. The petitioner's standing was not contested in this case.

BELA had its first success in the Doctors' Strike case.[89] The Bangladesh Medical Association (BMA) went on strike in favour of certain demands.[90] MM Hoque J issued an initial rule directing the doctors to refrain from striking. But again, since the government negotiated successfully with the doctors, the case became infractuous before a full judgement could be delivered. However, even the rule was enormously effective. It gave prestige and popular recognition to Dr Farooque and his organisation, which was an inspiration for subsequent PIL cases.[91] The rule also made it difficult for organisations to go on strike.[92]

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[87] Dr Mohiuddin Farooque v. Bangladesh unreported Writ Petition 891/1994.

[88] 46 DLR (1994) 235.

[89] Dr Mohiuddin Farooque v. Bangladesh represented by Secretary Ministry of Health and family Welfare & Others unreported Writ Petition 1783/1994.

[90] Huque and Chowdhury (1989: 67-80) discuss the nature, composition and operation of the BMA with the intention of assessing its role in the policy-making process in Bangladesh. They are of the opinion that there are no regular channels of mobilising public opinion and pressuring the government into accepting the demands of special interest groups.

[91] Major newspapers hailed the Court Order as a great victory. See the Ittefaq (5/10/94: 1).

[92] On 8th October 1994, for example, the Engineering, Agriculture and Medical cadre of the Bangladesh Civil Service officers, known as প্রকৃচি (*Prokrichi)*,

In 1994, a number of cases were negotiated before judgement, frustrated by steps taken by the government or kept pending. When judgement was given, standing was either not discussed or rejected. Thus the search for a pronouncement setting general principles and guidelines for PIL was not successful. But exceptionally, the Parliament Boycott[93] case and the Doctors' Strike[94] case gained some important ground in favour of PIL.

3.8 The Supreme Court dragged into politics (1995)

On 28 December 1994, the opposition en-masse resigned from the Parliament and continued their movement. Thus they could avoid the Court's direction, given in the Parliament Boycott[95] case, to go back to the Parliament. But the Speaker, in the hope of a compromise, was delaying his acceptance of their resignation. This caused a stalemate situation.

The result, the famous MPs Resignation case,[96] comprised of two writs. Raufique Hossain claimed that the attempt to resign is anti-constitutional while Alauddin Khalid asserted that the Speaker, by not accepting the resignation, is violating the Constitution. The Court was again involved in a controversial political issue and was under tremendous pressure, as the future of democracy

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postponed a proposed indefinite strike that was to begin from 10th October because of 'legal complications'.

[93] Above note 76.

[94] Above note 89.

[95] Above note 76.

[96] Raufique (Md) Hossain v. Speaker 15 BLD (1995) 383.

depended on its decision.

The Chief Justice constituted a special bench of three judges. In the leading judgement, Mahmudur Rahman J rejected the plea that the Court had no jurisdiction. However, both the petitioners, who came as 'conscious citizens', were denied standing because they did not have any constitutional or legal right which was violated.[97] Sangbadpatra provided the guiding principle.

Yet, this judgement was not particularly bad news for PIL activists for two reasons. First, the Court was by this time conscious that the political activists have hijacked the techniques of PIL for their own purposes. So it was repeatedly observed that this was not a PIL case.[98] Second, the Court did not attempt to overrule the earlier decisions including the public interest standing rules declared in the Parliament Boycott.

Finally the government, unable to decide, asked the Supreme Court to advise whether the boycott rendered the seats of the members empty. This was the First Constitutional Reference in Bangladesh history.[99] The Court declared the seats empty. While the prestige of the Court in the eyes of the people increased enormously, it was another opportunity for the Court to assert its power vis-à-vis the legislature.[100]

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[97] *Ibid.* at 389 and 392.

[98] *Ibid.* at 382, 388 and 392. Even the petitioners did not claim that this was PIL.

[99] 1995 (III) (Special issue) BLT (HCD) 159; 47 DLR (AD) (1995) 111. Article 106 of the Constitution of Bangladesh provides for the 'Advisory Jurisdiction of the Supreme Court'.

[100] See below chapter 5.2.2 for further discussion on the impact of this decision on the law of parliamentary privileges in Bangladesh.

In the meantime, nation-wide processions, picketing and strike continued. These strikes, which are known as *hartals*, were challenged by an advocate. In the Hartal case,[101] AB Siddique claimed that calling of *hartal* infringes his constitutional rights. MM Hoque J summarily rejected his petition.

The party in power attempted to counter the opposition by using publicly owned radio, TV and newspapers. This 'propaganda' by the government was challenged by Dr Farooque in the Media case.[102] This petition is awaiting trial.

When the Government started to compile a voter list in order to conduct an election, a voter challenged the voter registration form in Md Aminul Gani Titu v. Election Commission.[103] Again, the petition was summarily rejected.

Continued attempts by the democratically elected government to influence the judiciary through re-appointment of retired judges in various public posts gave rise to serious controversy. Furthermore, in the parliament, the government prevented a bill proposing more power to the Supreme Court regarding these matters.[104] Consequently, political and constitutional activists resorted to PIL and raised these issues in the Court.

Appointment of justice AKM Sadeque as Chief Election Commissioner

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[101] Abu Bakar Siddique v. Sheikh Hasina and others unreported Writ Petition 2057/95.

[102] Dr Mohiuddin Farooque v. Bangladesh unreported Writ Petition 466/95.

[103] Unreported Writ Petition 1154/95.

[104] See MI Farooqui (1996b: 65-68) for further discussion, where he demonstrated that the democratically elected government had been acting in the same way as the previous autocratic regimes and continued to keep the judiciary under pressure.

(CEC) was protested by the Opposition.[105] In Justice Sadeque, Mr Ullah challenged his appointment on the ground that the appointment of a judge who has already retired is anti-constitutional.[106] In Md Aminullah,[107] a judge's promotion to the post of joint secretary in the Ministry of Law was challenged. These two cases are awaiting trial, but since the judges are no longer in the posts questioned, it appears that they have become infractuous.

The controversy relating to justice Abdur Rouf is perhaps the most illustrative of the problem of appointment of judges. Justice Abdur Rouf, a judge of the High Court Division, was appointed by the government as the CEC in 1995. This was challenged by Mr Saleem Ullah in Justice Abdur Rouf[108] on the ground that an acting judge can not, at the same time, hold the office of the CEC. The appointment was also vehemently criticised by the opposition. In response, a supporter of the ruling party, Dr Ahmed Hussain, approached the Court as a citizen petitioner in Dr Ahmed Hussain v. Shamsul Huq.[109] He claimed that criticism by Shamsul Huq Chowdhury, chairman of the 'Co-ordination Council of the Lawyers' and an elected member of the Bar Council, amounted to contempt of court.[110] While this contempt case was lost on merits, Justice Abdur Rouf became infractuous because, as the judge retired from the post of CEC, the

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[105] The Bangladesh Observer (28/4/95: 1).

[106] M Saleem Ullah v. Justice AKM Sadeque unreported Writ Petition 1010/95.

[107] M Saleem Ullah v. Md Aminullah and others Writ Petition 93/95.

[108] Saleem Ullah v. Md Abdur Rouf, Chief Election Commissioner 48 DLR (1996) 144.

[109] 48 DLR (1996) 1.

[110] See the Bangladesh Observer (22/5/995: 1).

government reinstated him in the Appellate Division. However, this reinstatement was challenged by Mr Shamsul Huq Chowdhury in Shamsul Huq Chowdhury v. Justice Md Abdur Rouf[111] on the ground of violation of separation of powers. The Court held that the government has power to make such re-appointments under the existing constitutional provisions.[112]

It may be said that 1995 was not a good year for PIL because no good social action case came before the Court. The Vehicular Pollution case[113] was an exception where Dr Farooque sought to oblige the government to take steps to check hazardous smoke and unduly shrill horns of vehicles. This case is pending hearing.

Another activist step was taken by MM Hoque J in Eliadah McCord v. State.[114] A *suo moto* rule was issued when the judge read a newspaper report that an American girl accused of drug smuggling was sentenced for life when she was a minor.[115] On production before the Court, the accused admitted that she

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[111] 49 DLR (1997) 176.

[112] Chapter 5.3.2 discusses in detail the specific constitutional Articles to explore the impact of PIL cases on existing constitutional rules of appointment and discipline of judges. There are some other cases which are relevant even though no direct public or citizens interest was claimed. For example, in Md Masdar Hossain and others v. Bangladesh unreported Writ Petition 2424/1995, the vires of certain statutory provisions supposedly detrimental to the independence of judiciary was challenged by 218 judges. The case is still pending. In Aftab Uddin (Md) v. Bangladesh 48 DLR (1996) 1, the promotions of three District Judges were challenged by another District Judge. The Court held the promotions unconstitutional for lack of prior consultation with the Supreme Court.

[113] Dr Mohiuddin Farooque v. Bangladesh unreported Writ Petition 300/95.

[114] 48 DLR (1996) 495.

[115] The Daily Sangram (18/7/95: 1).

attained majority at the time of trial. But on humanitarian ground, the Court *suo moto* reduced her sentence and ordered her release.[116]

While desperate power-struggle between the political parties created a stalemate situation, a free press and strong public opinion prevented Army intervention and compelled the politicians not to ignore the Constitution. When the party in power finally agreed to create a caretaker system, the dispute was focused on how to amend the Constitution. Constitutional problems became the most important political and media issues. Mustafa Kamal J said: ". . . almost the whole of the educated citizenry of the country has turned into constitutional experts overnight."[117]

Supporters of political parties and constitutional activists attempted to bypass the political stalemate through judicial pronouncements. They claimed to represent the public interest and tried to utilise the newly found freedom the judiciary was enjoying. But the Court had to be careful not to be seen supporting any particular political party.[118] Especially after the Parliament Boycott case, the pressure was tremendous. The Chief Justice ATM Afzal acknowledged this in the 1st Constitutional Reference 1995:

> Having regard to the questions of law raised and the nature and context of the Reference and particularly our anxiety to keep the Court aloof from political controversies that are raging outside for long and the constraint of the time factor, we decided to keep the hearing confined

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[116] The Appellate Division, however, reversed this decision in Criminal Appeal 2/96. Subsequently, the girl was fortunate enough to obtain a Presidential pardon and was released in July 1996.

[117] Mustafa Kamal (1995: 6).

[118] For the stance of the Bangladeshi Supreme Court on the 'doctrine of political questions', see below chapter 5.1.

> to the representative section of and constitutional experts at the Bar. In order that the Court may not be held responsible for prolonging and thereby adding the "political crisis" by consuming a long time over the hearing, we decided to hear the matter with all expedition.[119]

The judges refused standing and rejected a number of cases like MPs Resignation, Hartal or Voters' Registration apparently to discourage pure political intentions of the petitioners. But they were still keen to decide on the matters of law. Thus, for example, in MPs Resignation and the Constitutional Reference they took a liberal view in determining the Court's jurisdiction. There was not a single case where the Court refused standing on the principle that PIL should not be allowed and no earlier pro-PIL decision was actually overruled.

Apparently, the Court's reluctance to grant full recognition to PIL was the result of the deluge of cases where special interests of the privileged groups were litigated in the name of the people. Political and constitutional activists effectively dominated the PIL-movement and the focus was not on social justice issues. While the judges did not say, in so many words, what PIL cases should be concerned about, they gave clear signals that the politicisation of PIL was not a good development.

3.9 Full recognition of PIL (1996 onwards)

Use of PIL for political purposes continued in 1996. The ruling party conducted an election in March that was boycotted by all major opposition parties. The new Parliament constitutionalised the concept of caretaker government by bringing

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[119] Above note 99 at 160.

the Thirteenth Amendment.[120] The first caretaker government was formed under former Chief Justice Habibur Rahman.

This government faced Md Asaduzzaman Ripon v. The State[121] where the Court restrained the functioning of several Government officers. The petitioner, a student leader of the Bangladesh Nationalist Party, claimed that these officers took part in the opposition movement violating their service rules. On appeal, the Appellate Division ordered them to resume duties till hearing of the case. This case is still awaiting trial.

The Caretaker government conducted a free and fair election which was won by the the Awami League. Democracy survived another great challenge. The new Awami League Government appointed Justice Shahabuddin Ahmed as the President, a ceremonial post.[122] This appointment was challenged in Justice Shahabuddin[123] by AB Siddique, the President of the Muslim Millat Party. Mr Siddique claimed that one can not join 'service of the republic' after retiring as a judge. He lost on merit.[124] But discussing the Berubari principle, MM Hoque J granted standing:

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[120] The Constitution (Thirteenth Amendment) Act (No.1 of 1996). This provides that the person who among the retired Chief Justices of Bangladesh retired last will be the Chief Adviser. Under the leadership of the Chief Adviser, a group of non-partisan advisers will run the government and conduct the parliamentary election. The President will remain as the titular head.

[121] Unreported Writ Petition 1635/1996.

[122] This is the second time Justice Shahabuddin Ahmed became President. Previously, he headed the interim government that conducted the democratic election in 1990 after the fall of Ershad.

[123] Abu Bakar Siddique v. Justice Shahabuddin and others 1 BLC (1996) 483.

[124] This is almost an echo of Saiyid Munirul Huda Chowdhury; see above chapter 3.3.

> Following the aforesaid principle enunciated by the Supreme Court we hold that since several constitutional questions of great public importance having far-reaching consequences are involved in the present case, the present writ petition is maintainable.[125]

Dr Farooque came in 1996 with a number of PIL cases. In Judges Appointment,[126] he sought to compel the government to appoint judges in vacant seats of the Supreme Court. Mahmudur Rahman J observed that this is a PIL but refused standing on the ground that no constitutional or legal right has been infringed. Although this case had a questionable public interest element and was lost, Dr Farooque brought a number of cases where genuine public interest was involved.

The right to life was extended in the Danish Milk[127] case where the importation of radio-active milk was successfully challenged by Dr Farooque. Kazi Ebadul Hoque J even went on to dictate how and in what manner government departments should co-ordinate their monitoring system. The standing of Dr Farooque was not challenged by the respondents.

In the Child Trafficking case,[128] Dr Farooque sought to stop kidnapping and trafficking of Bangladeshi children and using them as Camel jockeys, especially in the United Arab Emirates. This case is awaiting trial.

The standing of the petitioner was seriously contested by the government

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[125] Above note 123 at 489.

[126] Dr Mohiuddin Farooque v. Bangladesh represented by Secretary Ministry of Law, Justice and Parliamentary Affairs 48 DLR (1996) 433.

[127] Dr Mohiuddin Farooque v. Bangladesh represented by Secretary Ministry of Commerce and others 48 DLR (1996) 438.

[128] Issa Nibras Farooque and others v. Bangladesh represented by Secretary. Foreign Affairs and others unreported Writ Petition 278/96.

in the appeal of Dr Mohiuddin Farooque v. Bangladesh / Sikandar Ali Mondol v. Bangladesh (FAP 20),[129] a case which was previously lost in the High Court in 1994.[130] The only issue in question before the Appellate Division was the petitioner's standing, not the merit of the case. However, the concern of the petitioner was genuine because the environment of a huge area involving more than a million people was in issue.

The five justices of the Appellate Division found that the petitioner's intention was *bonafide* and unanimously granted standing in an epoch-making judgement. It was declared that in the Constitution of Bangladesh, which is 'autochthonous' in nature, the people are the ultimate holders of power.[131] Accordingly, social and economic justice issues must have primacy over special or individual interests. Thus in cases of public wrong or injury, any member of the public can file a writ petition on behalf of the entire public or a particular vulnerable section of the society.[132]

In FAP 20, PIL was recognised as a special type of constitutional litigation under the Bangladeshi legal system. As we have already analysed in chapter 2, the conceptual and constitutional basis of PIL was discussed in detail.[133] Public interest standing rules were declared in a liberal manner covering almost all

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[129] Above note 10.

[130] See above chapter 3.7.2.

[131] Above note 10 at 18.

[132] *Ibid.* at 19.

[133] See above chapter 2.4.6.

aspects of *locus standi* of the petitioner.[134] The Chief Justice invited Mustafa Kamal J to deliver the leading judgement, perhaps to remove confusions that arose after Mustafa Kamal J's decision in Sangbadpatra.[135] There was, however, no need to overrule Sangbadpatra or any other decision since it was declared that Sangbadpatra was not a PIL.[136]

It is interesting to note that FAP 20 has not been immediately followed by a large number of PIL cases. BELA is almost alone in its continuous focus on public interest test cases. In Dr. Mohiuddin Farooque v. Secretary, Ministry of Land,[137] the environmental problems arising from operation of brick factories near residential areas have been challenged. In Dr. Mohiuddin Farooque v. Secretary, Ministry of Housing and Public Works,[138] the environmental impact of filling up a late near Dhaka city has been questioned. These two cases are awaiting trial.

Another recent example is Ziaur Rahman Khan v. Government of Bangladesh,[139] where a number of citizen petitioners, political activists and MPs, questioned a new provision inserted in three statutes relating to local governments of certain areas.[140] This new provision empowered the government

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[134] See below chapter 4.4.5.

[135] *Ibid.* at 1.

[136] *Ibid.* at 17. Mustafa Kamal J said: "The Sangbadpatra Parishad case was decided on the facts of that case and that is how it should be read."

[137] Unreported Writ Petition 1252/1997.

[138] Unreported Writ Petition 948/1997.

[139] 49 DLR (1997) 491.

[140] The relevant statutes are Rangamati Hill Tract District Local Government Council Act (No. XIX of 1989), Khagrachari Hill Tract District Local Government Council Act (No. XX of 1989) and Bandarban Hill Tract District Local

to select the members of the councils to function for indefinite periods.[141] This was challenged as anti-constitutional as Articles 59 and 60 of the Constitution provide for democratic elections for local councils. The petitions were refused, but the Court went on to declare that the selected members are eligible to function for 60 days only, after which a fresh election is mandatory. Thus the petitioners, albeit indirectly and partially, have succeeded in their claim.

As a result of successful pioneering work, PIL was seen as a integral feature of the Bangladeshi legal system in late 1996. The Bangladesh Legal Aid and Services Trust (BLAST), the largest legal aid NGO of the country, entered the field and created a cell for PIL.[142] In July 26-27, A national workshop on PIL was held in Dhaka titled 'Public interest litigation: Sharing experiences and initiatives'. This was organised by BLAST, *Ain O Salish Kendra* and the Madaripur Legal Aid Association. Judges, lawyers and other PIL activists discussed future strategies. Instead of a litigation only approach, Bangladeshi activists were now realising the importance to diverge in order to pursue other types of public interest law activities.

Our discussion demonstrates that the progress of PIL in Bangladesh has been closely connected with the current constitutional developments. In the process of democratisation, political activists were eager to take part in the

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Government Council Act (No. XXI of 1989). In all these statutes, section 16 dealt with the time limit of elections.

[141] Section 16A was inserted in all the three hill tracts local council statutes by Amending Acts Nos. II, III and IV of 1997.

[142] BLAST was registered in 1993 as an NGO. It is also registered as a Company limited by guarantee. Through its eight unit offices and two legal aid clinics it engaged 313 lawyers in 1995.

constitutional discourse relating to power-sharing. When PIL began to advance, from the very beginning, applicants from privileged backgrounds including political activists started using the techniques of PIL to further their own causes. They dominated the movement for PIL to such an extent that the progress of genuine PIL issues has been seriously hampered. Gradual recognition of PIL was mainly the result of a small number of cases involving genuine social and economic justice issues as opposed to the cases where special or political interests of the élite were at stake.

Chapter 4
Locus standi of the PIL petitioner: The Supreme Court in search of a new set of rules

The constitutional mechanism under Article 102, which provides for the 'writ jurisdiction', enables a petitioner to have direct access to the Bangladeshi Supreme Court where public interest is involved. Traditionally, this avenue remained restrictive due to the conservative principles of *locus standi*. These rigid principles posed an initial problem and a most important issue in the development of PIL Bangladesh. The present chapter analyses the principles and rules of standing and the process of recent developments to determine the impact of PIL on these issues. It has also been argued that the use of PIL by the élite has often hindered the development of the rules of public interest standing.

The background of the writ jurisdiction can be traced from the English courts to the courts of the sub-continent, including the Supreme Court of Bangladesh. The Bangladeshi legal system has not only inherited the broad principles of the English law of writs, it continues to be influenced by the recent English and sub-continental developments. Especially, the progress of public interest standing in Bangladesh have closely followed the Indian developments. Thus it is relevant to briefly outline the background of the writ jurisdiction, to trace the traditional rules of standing and to examine the recent PIL developments in this regard in England India and Pakistan. These issues have been discussed in the first part of the chapter.

Remedies in the nature of writs provided by the Constitution of Bangladesh are of two broad categories depending on whether or not a person requires to be 'aggrieved' to come to the Court. The first category of remedies, where 'any person aggrieved' can approach the Court, involves remedies in the nature of *certiorari*, *prohibition* and *mandamus*. Our analysis demonstrates that since the issue of standing is a mixed question of law and fact, claims of public interest standing in order to promote special interests of the privileged have actually hindered and delayed the progress of PIL in its various stages of development.

The second category of remedies, where even a person not 'aggrieved' can approach the Court, involve remedies in the nature of *habeas corpus* and *quo warranto*. Traditionally, in England as well as in the sub-continental legal systems, this wide general rule was very cautiously applied. Our discussion shows that the result of the new PIL approach in Bangladesh is not to throw the caution away but to ensure more activism on the part of the Court leading to liberalisation. While the political activists have used this opportunity to petition the Court in a considerable number of cases, the Court has repeatedly stressed that relief may be granted only where *bona fide* applicants approach the Court genuinely in the public interest.

4.1 Judicial remedies in the nature of writs and the law of standing in England

The discussion of the present sub-chapter has two main themes. First, the backgrounds of the five writs in England have been outlined to focus on the fact that their origins, histories and purposes have been different and that these writs have been under the process of continuous development. Second, the principles of standing have been analysed to emphasise the lack of uniformity in traditional rules and somewhat unsatisfactory present situation despite recent developments. The impact of these issues will later be observed in chapters 4.4 and 4.5 relating to the development of public interest standing in Bangladesh.

4.1.1 Background of the writ jurisdiction

'Prerogative writs' originated in the English law to ensure that the public authorities properly carry out their duties and the inferior courts and tribunals function within their proper jurisdiction. Each writ has its own purpose. *Habeas corpus* is used to bring up the body of a person imprisoned or detained; *certiorari* reviews orders and convictions of inferior tribunals and removes indictments for trial; *prohibition* aims to prevent inferior tribunals from going beyond their jurisdiction; *mandamus* is issued to compel the performance of a public duty; *quo warranto* challenges the usurpation of public office.[1]

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[1]. These are the five prerogative writs subsequently imported and constitutionally recognised in the sub-continent. De Smith (1980: 585) notes that there are a number of obsolete and obsolescent ones such as *de non procedendo rege inconsulto*, *scire facias* and *ne exeat regno*.

These writs have different historical origins and had varying degrees of effectiveness at different stages of their development.[2] But by the sixteenth century, even the last of these remedies had become generally available to ordinary litigants. In the seventeenth and eighteenth centuries, these various writs came to be called 'prerogative' because they were conceived as being intimately connected with the rights of the Crown.[3] Except for *habeas corpus*, they are discretionary and are distinct from 'writs of course' because proper cause must be shown to the satisfaction of the Court why they should issue.

Prerogative remedies, it has been observed, escaped the radical reforms of the nineteenth century.[4] There remained enormous procedural defects, anomalies and complexities. An attempt in 1933 resulted in certain procedural changes.[5] In 1938 formalities were simplified by replacing the writs of *certiorari*, *prohibition* and *mandamus* by orders of similar title and scope.[6] As an exception, *habeas*

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[2] De Smith (1980: 584-595) provides an excellent outline of the historical origins of the prerogative writs.

[3] Wade and Forsyth (1994: 614) holds the generally accepted view that these writs were 'prerogative' because they were originally available only to the crown and not to the subjects. Their hallmark is that they are granted at the suit of the Crown. However, De Smith (1980: 584) points out that this view can be accepted only with a number of reservations. Thus, for example, *prohibition* and *habeas corpus* appear to have issued on the application of subjects from the very beginning. Similarly, although *certiorari* and *mandamus* were initially royal mandates, it seems that their earliest appearances in judicial proceedings were often the result of applications made by subjects.

[4] Wade and Forsyth (1994: 668).

[5] Administration of Justice (Miscellaneous Provisions) Act 1933, section 5. One significant development was that the applicant could proceed without the presence of the respondent in the preliminary stage.

[6] Administration of Justice (Miscellaneous Provisions) Act 1938, section 7. This was later replaced by Supreme Court Act 1981, section 29.

corpus remained a writ.[7] Information in the nature of *quo warranto* was replaced by injunction.[8] The procedure was somewhat simplified, but the substantive law remained the same.[9]

During and after the Second World War, administrative law became conservative, static and non-adventurous.[10] This situation changed in the 1960s and administrative law started to develop at a great pace. By the 1970s, due to the huge influx of administrative matters and the development of administrative law, the need for a radical change became apparent.

An important reform in English law was affected in 1977 by amendment of Order 53 of the Rules of the Supreme Court. Later the Supreme Court Act 1981, section 31 gave statutory force to these changes. Among other developments, by a single application for judicial review, an applicant can seek one or more of the remedies and the Court has option to grant either a declaration or injunction. This again is principally a reform of procedure. Many aspects of

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[7] Jackson (1977: 44) says that it was apparently thought that to meddle with *habeas corpus* might be construed as subversive activity. Sharpe (1989) provides a comprehensive specialist literature on *habeas corpus* focusing on the law of England and referring extensively to Australia, Canada and New Zealand. He concludes that *habeas corpus* is a versatile and flexible remedy, properly seen as a fundamental constitutional guarantee and a cornerstone of the rule of law.

[8] Administration of Justice (Miscellaneous Provisions) Act 1938, section 9. Later replaced by the Supreme Court Act 1981, section 30.

[9] Even procedurally, the law remained unsatisfactory. For example, *certiorari* and declaration could not be sought in one proceeding and there were no interlocutory facilities.

[10] Wade and Forsyth (1994: 18-19) describe this as a gloomy period for administrative law. They catalogue a number of judicial abdications and errors showing how the judges surrendered power that they previously enjoyed.

the remedies still remain complex and dependent on the old body of laws, but the reformation indicates a slow progress towards a more rational system.

4.1.2 Development of the rules of standing in the English courts

Even in the traditional law, standing rules for *habeas corpus* are quite liberal and the detenue himself or any person acquainted with the facts and circumstances of the case can approach the Court.[11] Similarly, in *quo warranto*, a stanger whose motive is not improper can apply for the remedy.[12] However, as to *certiorari, prohibition* and *mandamus*, the law of standing was quite complicated till 1977 as different rules applied for different remedies.

With regard to *certiorari*, the generally accepted view stated that there is no strict standing requirement.[13] If the applicant is a person aggrieved, the court will intervene *ex debito justitiae*, in justice to the applicant. Where the applicant is a stranger, the court considers whether public interest demands intervention. There was a second view demanding some interest of the applicant, but the authorities were in favour of the former view.[14]

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[11] See Sharpe (1989: 221-227) for the standing rules relating to *habeas corpus* in England.

[12] The leading case is R v. Speyer [1916] 1KB at 595.

[13] There is a long list of authorities supporting this view. In R v. Surrey Justices [1870] LR 5 QB 466 a local inhabitant succeeded in quashing a highway order made without proper notice. Later authorities include R v. Butt *Ex parte* Brooke [1922] 38 TLR 537; R v. Brighton Borough Justices, *Ex parte* Jarvis [1954] 1 WLR 203; R v. Thames Magistrates' Court, *Ex parte* Greenbaum [1957] 55 LGR 129 (a news vendor successfully challenged allocation of a street trader's pitch by a magistrate without jurisdiction).

[14] Cases supporting the second view appear to be either *obiter dictum* or ambiguous, e.g. R v. Russell, *Ex parte* Beaverbrook Newspapers Limited [1969] 1 QB 342

In case of *prohibition* one line of cases held that anyone can have *locus standi*.[15] But some other cases took a more private-right approach and required a specific interest in the applicant.[16] Still some other cases argued that the Court has no discretion to withhold a remedy if the jurisdictional defect is patent.[17]

Even though the meaning of 'particular grievance' appears to be wide, there were few examples of *certiorari* or *prohibition* granted to total strangers. One such example is R v. Greater London council *Ex parte* Blackburn,[18] where *prohibition* was issued at the instance of a private citizen applying primarily from motives of public interest. Similarly, the Court granted *certiorari* to a trade union acting on behalf of one of its members.[19] A citizen, having no legal right as such, successfully challenged a planning permission granted to his neighbour on the ground that the decision was vitiated by bias.[20]

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where the newspaper was considered a person aggrieved by a magistrate's orders affecting the rights of the press to report criminal proceedings. See also R v. Bradford-on-Avon Urban District Council, *Ex parte* Boulton [1964] 1 WLR 1136.

[15] Leading cases include De Haber v. Queen of Portugal [1851] 17 QB 171; Worthington v. Jeffries [1875] LR 10 CP 379.

[16] Foster v. Foster and Berridge [1863] 32 LJ QB 312; R v. Twiss [1869] LR 4 QB 407.

[17] Mayor and Alderman of City of London v. Cox [1867] LR 2 HL 239; Farquharson v. Morgan [1894] 1 QB 552. But in Chambers v. Green [1875] LR 20 Eq. 552, Jessel MR held that the Court always had discretion to refuse *prohibition* to a stranger.

[18] [1976] 1 WLR 550. Licensing of indecent films was successfully challenged. Although the applicant's wife, the co-applicant was a rate payer and they had children who might have been harmed by indecent films, that interest was not considered decisive.

[19] Minister of Social Security v. Amalgamated Engineering Union [1967] AC 725.

[20] R v. Hendon RDC *Ex parte* Chorley [1933] 2 KB 696.

In *mandamus*, one line of authorities started with R v. Lewisham Union[21] where the applicant was required to show infringement of a legal right in the traditional private law sense. Some cases used the term 'right' in a private sense but gave it a broader meaning.[22] Apparently, the courts failed to realise that *mandamus* was a public law remedy. Gradually, however, the situation improved as one line of authority explicitly regarded a sufficient or special interest as satisfying the requirements for standing. Sometimes this meant some genuine interest greater than that of the public at large.[23] In some later cases, the Courts started allowing standing to an applicant whose interest was no greater than that of other people.[24]

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[21] [1897] 1 QB 498. A local sanitary authority unsuccessfully sought *mandamus* against the guardians of a poor law union on the ground that they were neglecting their statutory duty to enforce the Vaccination Acts. The result of this judgement appears to be freedom for government departments to break the law. Thus in R v. Commissioners of Customs and Excise, *Ex parte* Cook [1970] 1 WLR 450 certain bookmakers were unable to enforce a statute against their competitors.

[22] R v. Hereford Corporation, *Ex parte* Harrower [1970] 1 WLR 1424.

[23] In R v. Manchester Corporation [1911] 1 KB 560 an insurance company was granted a *mandamus* to compel the Manchester Corporation to make a by-law as required by a local Act, since the Company had procured the provision in question that gave them an interest superior to that of the general public. See also R v. Cotham [1898] 1 QB 802.

[24] In R v. Paddington Valuation Officer, *Ex parte* Peachey Property Corporation Ltd [1966] 1 QB 380 a company was allowed to challenge a valuation list for rating purposes without showing that it was more aggrieved than any other ratepayer; similarly in R v. Commissioner of Police of the Metropolis, *Ex parte* Blackburn [1968] 2 QB 118 the police was sought to be compelled to take more effective action to enforce the law against gaming clubs and pornography.

Interestingly, as regards the meaning of the term 'aggrieved person', a most important authority, *Ex parte* Sidebotham,[25] was a case relating to statutory appeals rather than 'prerogative remedies'.[26] James LJ said:

> . . . the words "person aggrieved" do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A "person aggrieved" must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongly deprived him of something, wrongfully refused him something, or wrongfully affected his title to something.[27]

Sub-continental and Bangladeshi Courts often relied on this restrictive definition.[28]

By the 1970s, however, the law in England was gradually being liberalised. Especially, in the so called 'Blackburn/McWhirter'[29] cases, 'sufficient interest' criteria appeared to have replaced the 'legal right' formula.[30] The positive

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[25] [1880] 14 Ch. D 458. This was followed by a number of decisions including *Ex parte* Official Receiver In Re Reed Bowen & Co. [1897] 19 QBD 174 and Buxton v. Minister of Housing and Local Government [1961] 1 QB 278.

[26] Craig (1989: 357) observes that there is no necessary reason why the interpretation of bankruptcy legislation should carry analytical weight in other areas, and ample reasons can be found for distinguishing the decision.

[27] *Ex parte* Sidebotham above note 25 at 465.

[28] Bangladeshi PIL cases that adopted this restrictive definition and denied standing include Raufique (Md) Hossain v. Speaker 47 DLR (1995) 361 and Dr Mohiuddin Farooque v. Bangladesh / Sikandar Ali Mondol v. Bangladesh (1994) unreported Writ Petitions 998/1994 and 1576/1994. See also Mahmudul Islam (1995: 505) for a discussion on the issue.

[29] These cases, brought in public interest, include R v. Commissioner of Police, *Ex parte* Blackburn [1968] 2 QB 118; Blackburn v. Attorney General [1971] 1 WLR 1037; R v. Police Commissioner, *Ex parte* Blackburn [1973] QB 241; Attorney General v. Independent Broadcasting Authority [1973] QB 629 and R v. Greater London Council, *Ex parte* Blackburn above note 18.

[30] Harding (1989: 196-197) however points out that the 'sufficient interest' formula can be applied as restrictively as the 'legal right' formula - the distinction is not clear enough.

role played by Lord Denning in this respect greatly influenced sub-continental lawyers and judges.[31] While PIL was being introduced in Bangladesh, the activists consistently argued in the line of Lord Denning.[32]

In spite of some progress, the common law position in England remained confusing and in many cases contradictory. Some significant changes were brought in 1977-1981.[33] The new rules introduced application for judicial review, a single form of proceeding for all the remedies. There is now one simple and uniform test of standing - the applicant must have 'sufficient interest'.

In the famous case of R v. Inland Revenue Commissioners (IRC), *Ex parte* National Federation of Self-Employed and Small Businesses Limited,[34] a public oriented doctrine of standing, which was previously un-coordinated, gained attention. Their Lordships explained the new liberal law of standing and overruled the restrictive principle of Lewisham. Standing is declared to be a

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[31] For example, see Bhagwati J's discussion in the famous case of SP Gupta and others v. Union of India and others AIR 1982 SC 149 at 193.

[32] Bangladeshi activists have very high regard for Lord Denning's judgements and his book Discipline of Law (1979). Kazi Mukhlesur Rahman v. Bangladesh 26 DLR (SC) (1974) 44 at 52, known as Berubari, discussed one of the Blackburn cases - Blackburn v. Attorney General above note 29. Subsequently, the Blackburn cases were discussed in almost all PIL cases including the leading case of Dr Mohiuddin Farooque v. Bangladesh 17 BLD (AD) (1997) 1 at 12-13, known as FAP 20. See also Amir-ul Islam (1993: 8-10), Ishtiaq Ahmed (1993: 38-39) and Mahmudul Islam (1995: 508).

[33] Order 53 rule 3(5) of the Rules of the Supreme Court was amended in 1977 and was later incorporated in the Supreme Court Act 1981, section 31(3).

[34] [1982] AC 617. Casual workers in Fleet Street newspapers often adopted fictitious names and paid no taxes. IRC made a deal whereby the casuals would fill in tax returns for the previous two years, then the period prior to that would be forgotten. An association of taxpayers challenged the waiver of the large arrears.

mixed question of fact and law. Thus, even if the applicant's interest is remote, he has a reasonable chance of succeeding if there is a clear case of default or abuse. This suggests that an *actio popularis* is in principle allowable in suitable cases.

With respect to citizen's actions brought by a total stranger, the law of standing still remains unsatisfactory. There is hardly anything that provides a coherent set of principles in favour of *actio popularis*. Also, there remains the negative influence of *Gouriet*,[35] the modern authority on standing in injunction and declaration, where the House of Lords held that a private person can not enforce a public right substituting the Attorney General. However, it has been observed that the public law courts are increasingly receptive to public interest cases where applications are brought by persons whose own private rights are not affected.[36]

4.2 Remedies in the nature of writs in India and Pakistan and the rules of standing

In British India, the power to issue writs was conferred on the Supreme Courts of Calcutta, Madras and Bombay from the very beginning. When the successor High Courts were created under the High Courts Act 1861, this power was inherited. But the power was applicable mainly within these towns. In 1877, the Specific

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[35] Gouriet v. Union of Post Office Workers [1978] AC 435.

[36] Justice and Public Law Project (1996: 7). Relevent cases include R v. Inspectorate of Pollution, *ex parte* Greenpeace Ltd (No. 2) [1994] 4 All ER 328; R v. Secretary of State for Foreign and Commonwealth Affairs, *ex parte* Rees-Mogg [1994] 1 All ER 457 and R v. Secretary of State for Foreign and Commonwealth Affairs, ex parte The World Development Movement Limited [1995] 1 WLR 386.

Relief Act took away from the three High Courts the power to issue the common law writ of *mandamus* and granted power to issue directions in the nature of *mandamus*.[37] Again in 1898, the Criminal Procedure Code replaced the writ of *habeas corpus* with directions in the nature of *habeas corpus* and extended the Court's territorial jurisdiction.[38] In 1923, other High Courts gained the power to issue directions in the nature of *habeas corpus*.[39] All these changes were of form, not of substance.

The most significant development came when the Constitution of India was adopted on 26 January 1950. Under Articles 32 and 226, the Supreme Court and the High Courts have power to issue writs in the nature of *habeas corpus*, *mandamus*, *certiorari*, *prohibition* and *quo warranto*.[40] The jurisdiction of the Supreme Court is limited to matters of Fundamental Rights - the High Courts have no such limitation under Article 226.

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[37] Sections 45 and 50 of the Specific Relief Act 1877.

[38] Criminal Procedure Code 1898, Section 491. From this point, *habeas corpus* was available throughout the territory that was under the Courts appellate jurisdiction.

[39] This was done by amending section 491 of the Criminal Procedure Code.

[40] The power of the Indian Court is not limited to issuing the five writs but include any appropriate 'order' or 'direction'. Examples of leading cases taking advantage of this wider scope include Jashingbhai v. District Magistrate, Ahmedabad AIR 1950 Bombay 363; Ramsharan v. UP AIR 1952 All 752; Ajit Kumar v. Assam AIR 1963 Assam 46. Yet, it may be argued that the directions and orders issued in these cases are actually acknowledgement of a somewhat wider definition of the writ of *mandamus* in its Indian context. Seervai (1984: 1326) thus proceeds to say: "It is difficult to conceive of any 'direction' or 'order' which would secure a result which could not be secured by the writs expressly mentioned."

In Pakistan, Article 22 of the 1956 Constitution conferred power on the Supreme Court to enforce Fundamental Rights.[41] This resembled Article 32 of the Indian Constitution. Again, Article 170 followed the Indian Constitution's Article 226 and power of judicial review was given to the High Courts mentioning the name of the five writs. Unlike the Supreme Court, the power of the High Court was discretionary. When a new Constitution came in 1962, the Supreme Court's original jurisdiction was taken away and it could only hear appeals from the judgements of the High Courts. Also, Article 98, which replaced Article 170 of the old Constitution, did not mention the English writs by name. Instead, the article codified the jurisdiction incorporating the essence of the English writ jurisdiction.[42] The power of the High Court remained discretionary. Finally came the Constitution of 1973 where Article 199 retained the formulation of Article 98 of the 1962 Constitution. Despite these changes, there is little difference between the provisions of the Indian and the Pakistani Constitutions either in substance or in form.

By the time India and Pakistan introduced the writs as constitutional remedies, a very large body of case law had grown up in England around prerogative writs and the Indian and Pakistani judges turned to English decisions

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[41] For Pakistani law, see S Mahmood and N Shaukat (1992).

[42] Hamoodur Rahman J in Government of West Pakistan v. Begum Abdul Karim 21 DLR (SC) (1969) 1 at 11 observes with respect to *habeas corpus* that the new formulation frees the Court from formalities observed in the 'old prerogative writs'. This view appears to be too simplistic since any progressive development is due to changing circumstances where the judges are more willing to be active rather than a change of formulation or wording of the remedy in the Constitution.

for guidance.[43] But unfortunately, the approach of the judges became conservative and static as a result. The reason, as we have noted earlier, is that after the Second World War, administrative law in England relapsed into an impotent condition.[44]

4.2.1 Law of standing under the Indian constitutional provisions

As regards *habeas corpus,* the traditional English rule, that even a person other than the detenue can approach the court, is followed in India.[45] In *quo warranto* matters, from the very beginning, the Indian judges relied on R v. Speyer[46] and allowed any member of the public to apply provided that the application is made *bona fide*.[47]

With respect to *certiorari, prohibition* and *mandamus*, Indian judges had the opportunity to diverge from the English law of standing when 'prerogative writs' were incorporated as constitutional remedies. But the courts took a rather restrictive approach initially. It was held that the existence of a right of the

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[43] Although the broad principles are the same in both the countries, there are certain very important distinctions. The Indian Court is constitutionally empowered to exercise judicial review of legislation and constitutional amendment through its writ jurisdiction. Also the Indian parliament cannot exclude the jurisdiction of the Court by inserting a 'no *certiorari* clause' in a statute.

[44] See above chapter 4.1.1.

[45] See Seervai (1984: 1206) for the standing rules regarding *habeas corpus* in India.

[46] Above note 12.

[47] See for example: Maseh Ullah v. Abdul Rehman AIR 1953 All 193; Rajendre Kumar Chandanmal v. Government of State of Madhya Pradesh AIR 1957 Madhya Pradesh 60; VD Deshpande v. Hyderabad AIR 1955 Hyderabad 36.

petitioner is the foundation of the exercise of jurisdiction under Article 226.[48] Similarly, the right to be enforced under Article 32 must ordinarily be a right of the petitioner.[49]

Accordingly, it became an established principle that although in strict law any member of the public can apply for *certiorari*, it is unlikely that it would be granted to a person who was not aggrieved.[50] The High Court has no option but to accept the application by an aggrieved party. But in case of a stranger, the Court must be satisfied as to the validity of his claim. So there was little practical difference with the old English law. The situation was the same in *prohibition*.[51] In *mandamus*, numerous cases established that the applicant must be a person aggrieved.[52]

By the 1970s, the shortcomings of these restrictive rules became a matter of concern.[53] One line of exceptions gave some right to ratepayers and

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[48] Orissa v. Madan Gopal Rungta [1952] SCR 28 at 33; Kalinga Air Lines v. ITO AIR 1971 Cal 476 at 478.

[49] Chiranjit Lal Chaudhury v. Union AIR 1951 SC 41.

[50] TT Devasthanams, Tirupathi v. Ramachandra AIR 1966 AP 112; Muidanna v. RTA Anantapur AIR 1967 AP 137.

[51] The English decision of Farquharson v. Morgan [1894] 1 QB 552 has been repeatedly followed in India. See Govinda Menon v. Union AIR 1967 SC 1274.

[52] See for example Orissa v. Madan Gopal Rungta above note 48; Haji Sattar v. Joint Commissioners of Imports & Exports AIR 1953 Cal 591; Calcutta Gas Co. (Prop.) Ltd. v. WB AIR 1962 SC 1044; Mani Subral Jain v. State of Haryana and others AIR 1977 SC 276.

[53] Deshpande (1971: 153-188).

taxpayers.[54] Sometimes statutes recognised *locus standi* of persons not aggrieved in the traditional sense.[55] But a series of later cases went on further to accord standing in cases where the person or class of persons actually aggrieved could not come to the Court due to social, economic or other disadvantaged position.[56] The new rules of PIL standing developed by these cases gained an authoritative exposition in SP Gupta and others v. Union of India and others.[57] Bhagwati J said:

> . . . where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the Court for relief, any member of the public can maintain an application for an appropriate direction . . .[58]

When the grievance is not of any particular person or determinate number of people, but relates to the public in general:

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[54] In Varadrajan v. Salem Municipality AIR 1973 Mad 55, a ratepayer questioned misuse of funds. In KR Shenoy v. Udipi Municipality AIR 1974 SC 2177, a ratepayer could challenge granting of cinema licence by the municipality.

[55] In Ratlam Municipality v. Vardhi Chand AIR 1980 SC 1622, residents of a locality compelled a municipality to construct drain pipes. See also JM Desai v. Roshan Kumar AIR 1976 SC 578.

[56] See for example, Dr Upendra Baxi v. State of UP (1981) 3 SCALE 1136 (Two law professors had standing when they wrote a letter to the Court pointing out constitutional violations affecting inmates of a protected home); People's Union of Democratic Rights v. Union of India AIR 1982 SC 1473 (An association sought compliance with labour laws in relation of workmen in a construction project); Miss Veena Sethi v. State of Bihar (1982) 2 SCC 583; Fertilizer Corporation Kamgar Union v. Union of India AIR 1981 SC 344.

[57] Above note 31.

[58] *Ibid.* at 188.

> . . . any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision.[59]

Thus, the 'aggrieved person' formula was abandoned in favour of the 'sufficient interest' doctrine in matters of PIL. What is sufficient interest is to be determined by the Court in each individual case, since any attempt to define it would delimit its scope.[60] The result of these changes has been an explosion of PIL cases.

4.2.2 Law of standing under the Pakistani constitutional provisions

In *habeas corpus* matters, Pakistani judges follow the traditional English rules like their Indian counterparts and allow persons other than the detenue to approach the court.[61] Similarly, in *quo warranto* matters, the rule established in R v. Speyer[62] is followed and *bona fide* applications by strangers are allowed.[63] This has not been affected even after the replacement of the Latin term since the Constitution of 1962.

As regards *certiorari*, *prohibition* and *mandamus*, the courts in Pakistan initially followed the restrictive traditional rules of standing like the Indian

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[59] *Ibid.* at 194.

[60] *Ibid.* at 192.

[61] See S Mahmood and N Shaukat (1992: 749-750) for the standing rules regarding *habeas corpus* in Pakistan.

[62] Above note 12.

[63] SM Wali Ahmed v. Mahfuzul Haq PLD 1957 Dac 209; Mohammad Sadeque v. Rafique Ali PLD 1965 Dac 330; Dr Kamal Hussain v. Serajul Islam 21 DLR (SC) (1969) 23; Farzand Ali v. Province of West Pakistan PLD 1970 SC 98.

judges. The Court emphasised the need for the existence of a legal right of the petitioner to demand performance.[64] Thus a direct personal interest was required and the applicant had to be a person aggrieved. This view was taken with respect of Article 170 of the Constitution of 1956 in Tariq Transport v. Sargodha Bus Service.[65] Later, when the Latin terms were replaced in Article 98 of the Constitution of 1962, the old view was re-confirmed in Abdus Salam v. Chairman, Election Authority.[66]

A somewhat lenient view was expressed in Fazle Din v. Lahore Improvement Trust[67] where Hamoodur Rahman CJ said:

> . . . the right considered sufficient for maintaining a proceeding of this nature is not necessarily a right in the strict juristic sense but it is enough if the applicant discloses that he had a personal interest in the performance of the legal duty which if not performed or performed in a manner not permitted by law would result in the loss of some personal benefit or advantage or the curtailment of a privilege or liberty or franchise.[68]

This case, however, remained an exception and the general restrictive rule remained unchanged.

Following the advent of PIL in India, the Pakistani Court pronounced a new public interest standing in Benazir Bhutto v. Federation of Pakistan and

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[64] Pakistan v. Md Sayeed 13 DLR (SC) (1961) 94.

[65] PLD 1958 SC 437.

[66] 17 DLR (1965) 191. Similar view is taken in Pakistan Steel Re-Rolling Mills Association v. Province of West Pakistan PLD 1964 Lah 138.

[67] 21 DLR SC (1969) 225. In this case, the petitioner felt aggrieved when, in a residential scheme where he had his house, an adjacent plot earmarket for a market was given for setting up a sectarian institution.

[68] *Ibid.* at 230.

another.[69] Under Article 184(3) of the Constitution of 1973, the Supreme Court has power to make orders in the nature of writs when a question of public importance with reference to any of the Fundamental Rights arise. The Court thus held that an applicant need not be aggrieved if he comes *bona fide* for the enforcement of the Fundamental Rights of a group or a class of persons who are unable to come to the Court.[70] This case formed a basis and subsequent cases, both in the High Court and the Supreme Court, established PIL in Pakistan.[71]

The discussion so far illustrates a number of important factors of the development of public interest standing in India and Pakistan. The judges were influenced by the English situation where each 'prerogative writ' has its own distinct origin, purpose and history of development. To the sub-continental judges, a huge body of English case laws gave a false sense of security that the various rules and principles of writs were firmly established. But in fact, being a patchwork of authorities, there were numerous contradictions within this complexity. Also, the law was conservative, especially after the Second World War, when the Indian and Pakistani Courts turned to these decisions. In the sub-continent, the distinct liberal trend advocated by the written Constitutions was thus overlooked for a long time.

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[69] PLD 1988 SC 416.

[70] *Ibid.* at 491-493.

[71] The famous case that initiated PIL is Darshan Masih v. State PLD 1990 SC 513 where the Supreme Court enforced Fundamental Rights of bonded labourers on the basis of a telegram.

4.3 Remedies in the nature of writs in the Bangladesh Constitution

The Constitution of Bangladesh 1972 closely follows the Indian and Pakistani constitutions as regards the law of writs. Article 102 of the Constitution says:

> (1) The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution.
>
> (2) The High Court Division may, if satisfied that no other equally efficacious remedy is provided by law -
>
> (a) on the application of any person aggrieved, make an order -
>
> (i) directing a person performing any functions in connection with the affairs of the Republic or of a local authority to refrain from doing that which he is not permitted by law to do or to do that which he is required by law to do; or
>
> (ii) declaring that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority has been done or taken without lawful authority and is of no legal effect; or
>
> (b) on the application of any person, make an order -
>
> (i) directing that a person in custody be brought before it so that it may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or
>
> (ii) requiring a person holding or purporting to hold a public office to show under what authority he claims to hold that office.

The first part, Article 102(1), relates to Fundamental Rights. The power of the Court is not discretionary since Article 44(1) declares that the right to move the Court to enforce Fundamental Rights is itself a Fundamental Right.[72] So the situation is similar to Article 32 of the Indian Constitution.[73]

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[72] This has been re-iterated, among other cases, in Haji Joynal Abedin v. State 30 DLR (1978) 375 and Government of Bangladesh v. Ahmad Najir 33 DLR

In cases not involving Fundamental Rights, Article 102(2) uses the same language and defines the same five types of writs as Article 98 of the Pakistan Constitution of 1962. Thus clause 2(a)(i) provides for remedies in the nature of *prohibition* and *mandamus*, clause 2(a)(ii) grants *certiorari*, clause 2(b)(i) relates to *habeas corpus* and clause 2(b)(ii) deals with *quo warranto*.

For the purpose of our discussion on standing, however, we have two broad types. In the first category are cases under clause 1 and clause 2(a) where the applicant must be 'any person aggrieved'. In the second category are cases under clause 2(b) where any person can apply, whether or not aggrieved. Interestingly, in cases of *habeas corpus* and *quo warranto*, the applicant is required to show grievance in cases of Fundamental Rights but not in cases of legal rights. This apparent anomaly, however, does not give legal rights more importance than Fundamental Rights. The Court has taken the prudent view of harmonious interpretation and as such no one is denied relief on this issue. Mahmudul Islam says:

> It is very difficult to accept a contention that the condition for enforcement of the fundamental right relating to personal liberty is

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(AD) (1981) 257. The effect is clearly demonstrated in the recent case of Jobon Nahar and other v. Bangladesh and others 49 DLR (1997) 108. In this case the Court held that since the right to enforce a Fundamental Right is another Fundamental Right, the petitioner can move the Court even though his application was rejected by the Court of Settlement on the ground of limitation.

[73] One difference is that the decisions of the Bangladeshi High Courts are not final and are subject to appeal under Article 103. There is another important difference. In India, since Article 32 only involves breach of Fundamental Rights, if the applicant's challenge involves both Fundamental Rights and legal rights, he must go to the High Courts under Article 226 where the remedy is discretionary. In Bangladesh, one petition containing both types of breach is sufficient.

> more onerous than the condition for issuance of an ordinary writ of *habeas corpus*. A reasonable and harmonious interpretation should be given and it should be taken that the requirement of 'aggrieved person' to apply for enforcement of fundamental rights is not applicable in respect of a petition involving detention of any person. In fact, the courts have not insisted on an application by an aggrieved person even though the petition for *habeas corpus* alleged violation of fundamental rights.[74]

In spite of the close resemblance with the Indian and Pakistani constitutional provisions, the standing rules in Bangladesh have developed through a somewhat different route. The following sub-chapters will examine how the Bangladesh Supreme Court, following the English, Indian and Pakistani Courts, gradually came out of the restrictive *locus standi* rules.

4.4 Standing rules in Bangladesh with respect to *certiorari*, *prohibition* and *mandamus*

The present sub-chapter analyses the development of public interest standing rules relating to the writs of *certiorari*, *prohibition* and *mandamus*. Chapter 4.4.1 examines relevant pre-PIL developments; chapter 4.4.2 analyses initial cases where liberal standing rules were refused; chapter 4.4.3 explores the arguments forwarded by activist lawyers and judges in favour of wider rules; and chapters 4.4.4 and 4.4.5 analyses the cases that have established new public interest standing principles. We focus on the principle that standing is a mixed question of fact and law to illustrate that the development of public interest standing has often been hindered because of the use of PIL for the causes of the privileged.

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[74] Mahmudul Islam (1995: 455).

4.4.1 'Person aggrieved': Pre-PIL development in Bangladesh

When the Bangladesh Supreme Court started functioning under the Constitution of 1972, there was no apparent reason to interpret the law of standing differently from the Pakistani Courts. Nothing in the Constitution suggested a departure from the 'well-established' constitutional principles of *locus standi* that are applicable to the more or less identical provisions of the Constitutions of India and Pakistan. In fact, the formulation of Article 102 is the same as Article 98 of the Pakistan Constitution of 1962. So the Court remained loyal to the conservative tradition of English, Indian and Pakistani authorities.

Thus it was held in Eastern Hosiery Mills Sramik Bahumukhi Samabaya Samity Ltd. and another v. Government of Bangladesh[75] that the petitioner must have some right and direct personal interest in the subject matter. Later, Ruhul Islam CJ's explanation in Dada Match Workers Union[76] became an authority:

> An application for an order of *certiorari* can only be made by an aggrieved party and not merely one of the public and in the case of *mandamus* it is an established principle that the applicant must show that there resides in himself a legal right to the performance of the legal duty by the party against whom the *mandamus* is sought.[77]

This restrictive approach was followed in a number of cases even when the rules in other jurisdictions were being liberalised.[78]

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[75] 27 DLR (1975) 674.

[76] Dada Match Workers Union v. Government of Bangladesh 29 DLR (1977) 188.

[77] *Ibid.* at 194.

[78] A series of cases followed this view. See for example Khulna Shipyard Employees Union v. General Manager, Khulna Shipyard and others 30 DLR (1978) 368 and Zamiruddin Ahmed v. Government of Bangladesh 34 DLR (1982) 34.

In spite of this conservative rule of standing, the Court from the very beginning realised that there can not be any hard and fast definition of the term 'person aggrieved'. Since the facts and circumstances of each case are different, one generalised rule would cause hardship. Even in the Pakistan period, the Dhaka High Court expressed this opinion in Abdus Salam.[79] In the Bangladeshi period, as has been analysed later, Berubari first established this principle with regard to the Bangladesh Constitution.[80] More recently, Amir-ul Islam Chowdhury J said:

> There is no hard and fast meaning that could be ascribed to the term "aggrieved person". The meaning of the term "aggrieved person" is to be determined with reference to the facts and circumstances of each case.[81]

But despite the absence of a precise definition of the term 'person aggrieved', the judges did not use the opportunity in favour of liberal interpretations. Where traditional principles constituted a bar, standing was not given merely on the strength of the merits of a case. Thus apart from the recognition that standing is a mixed question of fact and law, very little real progress was made. The result was the same whether the applicant purported to represent the aggrieved or came as a concerned citizen.

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[79] Above note 66 at 198.

[80] See below 4.4.1.2.

[81] Zamiruddin Ahmed above note 78 at 42. In this case, a constituted attorney was allowed to petition on behalf of the aggrieved who was out of the country and was prevented by the Government from returning.

4.4.1.1 Representative standing

Sometimes a group or an organisation seeks to take action on behalf of its members or to protect their interests. It has been held by the Bangladesh Supreme Court that a trade union,[82] a society or an association[83] is not a 'person aggrieved' for the purpose of Article 102 when it is representing its members. This means that although a trade union can represent its members in industrial disputes and an association in various other forums - a writ in a representative capacity on behalf of the members is not allowed.

However, the union or society will have standing when it is not representing the members and is aggrieved itself.[84] In case of a company, it must apply itself with regard to its operations, not individual members or shareholders. The reason is that a company has a distinct and separate legal entity and stands on a different footing than a society.[85] Although representative applications are denied, a constituted attorney can apply for a person aggrieved.[86]

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[82] See Dada Match Workers Union above note 76 and Khulna Shipyard Employees Union above note 78.

[83] Bangladesh Electrical Association and others v. Bangladesh 46 DLR (1994) 221.

[84] In Bangladesh Hastashilpa Samabaya Federation Ltd (KARIKA) v. Bangladesh 45 DLR (1993) 324 at 327, a society was given standing when the subject-matter related to the management of the society.

[85] Bangladesh Jute Mills Association v. Director General of Food and others (1989) Unreported Writ Petition No. 295/1989. See also Md Siddiqur Rahman and others v. The Board of Trustees, Port of Chittagong and others 27 DLR (1975) 481 (A corporate body is a person). These cases relied on the Indian case of Charanjit Lal Chowdhury above note 49.

[86] Zamiruddin Ahmed above note 78.

4.4.1.2 Public interest standing

The classification of public interest standing into two broad categories has been recognised by the Bangladeshi courts.[87] In representative public interest standing, the applicant comes for a person or class of persons who by reason of helplessness, disability or economic inability cannot move the court for relief.[88] In citizen standing, a breach of public duty results in violation of collective right of the public at large.

In Berubari,[89] when the applicant challenged an international treaty, he actually came to vindicate his own rights. His right to move freely throughout the territory and to reside and settle in any place therein as well a his right of franchise was threatened. But the judgement clearly re-interpreted a citizen's right vis-à-vis the power of the State. Sayem CJ said:

> It appears to us that the question of *locus standi* does not involve the Court's jurisdiction to hear a person but of the competency of the person to claim a hearing, so that the question is one of discretion which the Court exercises upon due consideration of the facts and circumstances of each case.[90]

He also added:

> . . . We heard him in view of the constitutional issue of grave importance raised in the instant case involving an international treaty affecting the territory of Bangladesh and his complaint as to an impending threat to his certain fundamental rights guaranteed

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[87] Latifur Rahman J in FAP 20 above note 32 at 25.

[88] Our discussion excludes representative suits under Order 1 rule 8 of the Code of Civil Procedure 1908 because it falls under statutory law and not constitutional remedies. In a representative suit, numerous persons may have the same interest in the subject matter and any number of them, with the Court's permission, may sue or defend on behalf of all.

[89] Above note 32.

[90] *Ibid.* at 52

> by the Constitution, namely, to move freely throughout the territory of Bangladesh, to reside and settle in any place therein as well as his right of franchise. Evidently, these rights attached to a citizen are not local. They pervade and extend to every inch of the territory of Bangladesh stretching upto the continental shelf.[91]

Thus we have several important propositions.[92] Sayem CJ begins by pointing out that standing does not involve the Court's jurisdiction to hear a person. In other words, standing and justiciability must not be confused. Then he proceeds to suggest that the Court has discretionary powers to determine standing which involves competency of the applicant to claim a hearing.

As to this competency, there are two situations. If it is merely a question of law, the old rules of *certiorari*, *prohibition* or *mandamus* will determine standing depending on the type of relief sought. But if it is a question of fact, the old rules can be abandoned since standing will depend on the gravity of the situation. Although Berubari emphasised the Court's discretionary power to determine each case on the basis of its merits, it did not altogether reject the old rules or declare that the question of fact is the sole determining factor. So in effect, standing remains both a question of law and of fact but in certain cases a broader approach must be taken.

Berubari identified the cases where the Court is required to take such a broader approach. When the Fundamental Right of a citizen is infringed or threatened, it is enough if he shares the right in common with the public in general, he need not have a special grievance.[93] Also, if a constitutional issue of

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[91] *Ibid.* at 53.

[92] Afzal CJ (FAP 20 above note 32 at 3) holds that two general principles were established while Mustafa Kamal J (*ibid.* at 14) identifies seven.

grave importance affecting one's Fundamental Rights is raised, he qualifies as aggrieeved.

Thus what started as a case to enforce one individual's Fundamental Rights, ended up in demolishing the 'special grievance' formula in certain situations. Berubari, however, does not deal with cases where public-spirited individuals or groups, not affected themselves, seek to move the Court to protect the Fundamental Rights of others.

Berubari remained an exception even though one or two attempts were made to use public interest standing arguments. In Mazharul Huq v. The Returning Officer and others,[94] a voter was denied standing when he claimed deprivation of right of franchise and demanded re-election. The Court examined the relevant statute in a mechanical way although, as a result, a substantial portion of the electorate was prevented from voting for their party or candidate of choice.[95]

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[93] One interesting factor is that the people who were residents of Berubari, the enclave in question, probably had a special grievance. But they were under the administrative control of India and were unable to come to the court.

[94] 27 DLR (AD) (1975) 11. In this case, a candidate for a local election was declared un-contested winner since the only opposing candidate had died before the polling day. The petitioner also made a failed attempt to show his personal interest by claiming that he had 'indomitable desire' to contest the election but refrained himself in support of the deceased candidate.

[95] The changing attitude of the Court can be seen in the recent comparable decision in Sharifuddin (Md) v. Md Mofizuddin Sarker 49 DLR (1997) 86 where the Court directed re-election because participation of a disqualified candidate materially affected the result of the election.

In a more important case, MG Bhuiyan v. Bangladesh,[96] an advocate challenged the constitutionality of an Ordinance on the ground that every citizen can come to the court for declaration of nullity of any law. The Appellate Division refused to make an exception of the traditional rules and denied standing because it could not find his legal right or specific grievance.

Berubari is often regarded as the first Bangladeshi PIL case and was relied upon by the PIL petitioners in almost all subsequent attempts to attain standing.[97] But as a 'first case', Berubari was perhaps a poor model for public interest standing. It was a case by a political activist and dealt with the right to freedom of movement and residence. It served the purpose of the politically conscious rather than the socially or economically deprived. Since *locus standi* is a mixed question of law and fact, it was very difficult in subsequent cases to convince the Court that the issue in question was one of 'grave constitutional importance'. Thus both in Mazharul Huq and MG Bhuiyan, the petitioners were treated as advocating their own political causes and were denied standing.

4.4.2 Initial PIL cases refusing public interest standing

Initially, when the term PIL was used by the petitioners asking for public interest standing, there were two main problems. Sometimes the causes they espoused did not concern public interest, in some other cases, the judges were too conservative

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[96] BCR 1981 AD 80. This was an appeal from BCR 1982 HCD 320.

[97] For observations of Bangladeshi judges on this point, see above chapter 3.1.

to widen the traditional principles. In this respect, the leading case is Sangbadpatra[98] which was subsequently followed by a series of cases.

4.4.2.1 Sangbadpatra

PIL, after the term was coined, was first pleaded in Sangbadpatra, a case that generated interest in the subject and gradually included PIL in the judicial agenda. In that case, an association of newspaper owners challenged the Constitution and an award declared by a statutory Wage Board.

The preliminary issue in question was whether the association has standing to bring a writ application on behalf of its members. It was claimed that the said association was the only representative of the newspaper owners who were undoubtedly aggrieved. The High Court division relied on the principle that since direct personal interest is absent, an association, not being itself a 'person aggrieved', can not come to Court on behalf of its members.[99] The Court relied on the principle established in earlier cases including Dada Match Workers Union[100] and Khulna Shipyard Employees Union.[101] Berubari was discussed but considered not relevant. Abdul Jalil J observed that the association in question, Bangladesh Sangbadpatra Parishad,

> . . . has nothing to lose or win by the impugned award. It is the owners of the newspapers and the employees who are affected by

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[98] Bangladesh Sangbadpatra Parishad (BSP) v. The Government of People's Republic if Bangladesh and others 12 BLD (AD) (1992) 153.

[99] Bangladesh Sangbadpatra Parishad (BSP) v. The Government of People's Republic if Bangladesh and others 43 DLR (1991) 424.

[100] Above note 76.

[101] Above note 78.

> the award and not Bangladesh Sangbadpatra Parishad. This Parishad may represent the employers anywhere but it has no *locus standi* to invoke the jurisdiction of this Court under Article 102 of the Constitution as it is not a "person aggrieved" for the purpose of Article 102 of the Constitution.[102]

When the case came to the Appellate Division, Mustafa Kamal J upheld this view. He re-iterated that the petitioner may represent the employers in the Wage Board and may even have capacity to act as the employer's representative in various other forums, but has no *locus standi* with respect to the writ jurisdiction. This does not mean, he further clarified, that the petitioner can never file a writ petition. "It can and it may, if it has a personal interest in the subject matter".[103]

Another line of argument was presented in the Appellate Division for the first time. Public interest standing was claimed. It was argued that 'almost anyone' can challenge the Constitution and decision of the Wage Board because it involves violation of the Fundamental Right of freedom of the press. Mustafa Kamal J rightly said:

> . . . the present case is definitely not a public interest litigation. The petitioner is not espousing the cause of a downtrodden and deprived section of the community unable to spend money to establish its fundamental rights and enforce its constitutional remedies. It is not acting *pro bono publico* but in the interest of its members.[104]

Sangbadpatra demonstrates that the techniques of PIL were taken up by the élite for their own purposes at the very beginning of the introduction of public interest

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[102] Above note 99 at 429.

[103] Above note 98 at 156.

[104] *Id.*

standing in Bangladesh. As a result, since standing is a mixed question of law and fact, the Court refused to modify the traditional rules in favour of opulent media magnets. The outcome was actually unfavourable to the development of public interest standing. In fact, the observations of the Court on PIL raised confusions. The judge said:

> In our Constitution, the petitioner, seeking enforcement of a fundamental right or constitutional remedies, must be a "person aggrieved". Our Constitution is not at *pari materia* with the Indian Constitution on this point. The Indian Constitution, either in Article 32 or in Article 226, has not mentioned who can apply for enforcement of fundamental rights and constitutional remedies. The Indian Court only honoured a tradition in requiring that the petitioner must be an "aggrieved person". The emergence in India of *pro bono publico* litigation, that is litigation at the instance of a public spirited citizen espousing causes of others, has been facilitated by the absence of any constitutional provision as to who can apply for a writ . . .
>
> Therefore, the decisions of the Indian jurisdiction on public interest litigation are hardly apt in out situation. We must confine ourselves to asking whether the petitioner is an "aggrieved person", a phrase which has received a meaning and dimension over the years.[105]

From this observation, arguments against PIL could be drawn by inference. First, Indian decisions on PIL are not relevant since the constitutional dispensation in the two countries is not the same. So the advance of PIL in India is to be totally ignored. Second, the petitioner must himself be a 'person aggrieved'. This is a constitutional imperative which the judges can not ignore. The Indian situation is different because there is no provision as to who can apply for a writ. Third, the meaning of 'person aggrieved' must be taken from earlier authorities and traditions since it is, as stated above, "a phrase which has received a meaning and a dimension over the years".

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[105] *Ibid.* at 155.

4.4.2.2 Other cases

After Sangbadpatra, the judges of the High Court took a restrictive view and relied heavily on the observations of Mustafa Kamal J In Syed Mahbub Ali and others v. Ministry of law and others,[106] certain members and officials of the Bar challenged the promotion of subordinate courts judges by the government without consultation with the Supreme Court. The petitioner's reliance on Berubari was considered not relevant. The Court relied on Sangbadpatra and said that the petitioners may represent the bar elsewhere but not in writ jurisdiction.

In the High Court Division's judgement in FAP 20,[107] where a governmental scheme to control flood was challenged, the Court again relied on Sangbadpatra and accordingly refused to consider Indian cases on PIL. From the English jurisdiction, Gouriet[108] was discussed.

A culmination of this line of argument can be found in Raufique (Md) Hossain v. Speaker, Bangladesh Parliament and others.[109] The opposition members resigned from the Parliament *en masse*, an act for which no constitutional provision can be found. In this case, almost all the leading authorities on standing from England, India and Pakistan were discussed along with Bangladeshi judgements. Mahmudur Rahman J heavily relied on

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[106] (1992) unreported Writ Petition 4036/1992.

[107] Dr Mohiuddin Farooque v. Bangladesh / Sikandar Ali Mondol v. Bangladesh (1994) Writ Petitions 998/94 and 1576/94.

[108] Above note 35.

[109] 47 DLR (1995) 361 at 385-388.

Sangbadpatra and re-iterated the basic arguments that the applicant must be a 'person aggrieved' and the meaning of the term must be restrictively defined as has been traditionally established over the years. He could not find any violation of Fundamental Rights probably because he was looking for direct and unique personal interest of the petitioners.

Interestingly, it was asserted in the judgement that this was not a social action or public interest case.[110] It was not social action, but as in Berubari, there was undoubtedly a 'constitutional issue of grave importance'. It is possible that this assertion was an attempt not to be seen as opposing the newly emerging PIL phenomenon. In any case, the result was unfavourable for PIL because it was not made clear what would happen if it was a public interest matter. The doubt was further fuelled by the following observation by Mahmudur Rahman J.:

> Article 102 of our Constitution because of the expression a "person aggrieved" and expression "enforcement of any fundamental rights conferred by Part III of this Constitution" has narrowed down the scope of this writ jurisdiction unlike that of India under Article 226 in which the fathers of the Constitution in their attempt to meet the social economic condition and for enforcement of such right widened the jurisdiction consciously . . . As I have examined several decisions cited at the Bar of the Indian jurisdiction I think that those are on the language employed in the Indian Constitution which is much wider in scope to apply high prerogative writs by the Supreme Court under Article 32 and by the respective High Courts of India under Article 226.[111]

Apparently, it was taken for granted that Article 102, through its requirement of 'person aggrieved', makes a tough barrier for any liberalisation of *locus standi*.

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[110] *Ibid.* at 388.

[111] *Id.*

While FAP 20 was an exception, the petitioners in both Syed Mahbub Ali and Raufique (Md) Hossain pursued their own political agenda. Thus although they claimed that they were representing the people, the judge was reluctant to grant standing. But the Court was by this time well aware that the élite were using the arguments of public interest standing for their own purposes. This is reflected in the declaration in Raufique (Md) Hossain that it was not a PIL case.

4.4.3 Examining the arguments in favour of public interest standing

Chapter 2 above already discussed in detail the new and liberal rules of interpretaton of the Constitution.[112] These rules state that any particular constitutional provision must be read in the context of the entire Constitution and accordingly a PIL approach must be taken since the Constitution of Bangladesh mandates social justice and the people are the focal point of its concern. As long as these liberal rules were unrecognised, *locus standi* as well as other aspects of PIL could not be liberally construed. Thus we find that public interest standing gained gradual recognition along with the acceptance of liberal public interest rules of interpretation of the Constitution. The single stumbling bloc for the new construction was the term 'any person aggrieved' contained in clauses 1 and 2(a) of Article 102.

It has been observed that the Constitution does not define the term 'person aggrieved'.[113] Ishtiaque Ahmed says:

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[112] See above, chapters 2.4.5 and 2.4.6.

[113] Mahmudul Islam (1995: 511).

> . . . it must be recognised that however inappropriate and inept the expression "person aggrieved" may be in the total context of the Constitution and of Art. 102, it is not a term defined by the Constitution.[114]

Thus it appears that the judges are free to define the term in consonance with the social and collective justice spirit of the Constitution instead of blindly following traditionally inherited rules.

Since the Constitution does not define the term, the judges have relied on the numerous authorities on the point. Too much reliance on the so called 'established rules' propounded by these authorities has been the cause of serious confusions, contradictions and conservatism. The result is Mustafa Kamal J's assumption in Sangbadpatra that the phrase 'person aggrieved' has received a fixed meaning and dimension over the years.[115]

This assumption is not correct due to several reasons. In England, as we have already discussed, each 'prerogative writ' had its separate origin, purpose and history of development.[116] So the rules of standing for each writ developed differently by the judges who were dealing with one case at a time. Thus even in the same writ, contradictory and confusing standards were applied in different cases.[117] Sub-continental Courts followed this tradition and even when the Pakistani Constitution of 1962 discarded the Latin terms, there was no shift from the earlier position.[118] Acceptance of restrictive English decisions by some earlier

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[114] Ishtiaq Ahmed (1996: 7).

[115] Above note 98 at 155.

[116] See above chapter 4.1.1.

[117] *Id.*

[118] See above chapter 4.2.2.

sub-continental authorities was later followed in the majority of cases. As a result, the judges had more than one test to ascertain aggrievement. Thus the rule was expressed in various terms including 'particular grievance', 'specific legal right', 'sufficient interest and 'special interest'.[119] This is no proof of the phrase receiving a specific meaning and a particular dimension over the years.

The term 'person aggrieved' was generally used for *certiorari*. Thus when the term is used for the three writs under the Constitution, it is difficult to fix a single ascertainable meaning. Even when it is used in relation to other writs, the test is never the same. Recent developments in England towards a more uniform system also show the absence of any immutable principles.[120]

A main problem of identifying an all-accepted definition of the term is that the issue of standing is a mixed question of law and fact. Since the adoption of the 'sufficient interest' formula in England and India, the judges in the two countries have shown different degrees of willingness to grant public interest standing.

Also important is the fact that there is no such concept of constitutionally declared Fundamental Rights in England. Being fundamental and having a special status in the scheme of a written constitution, these rights are inviolable. Thus, the principles of Lewisham or Sidebotham may be relevant to legal rights, but it is not right to apply them unhesitatingly to all matters of Fundamental Rights in Bangladesh.

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[119] Ishtiaq Ahmed (1996: 9).

[120] See R v. Inland Revenue Commissioners above note 34.

It has been repeatedly asserted that under the Constitution, a person does not have to be 'personally', 'directly', or 'primarily' aggrieved.[121] Amir-ul Islam argues on the point that the formulation is 'application of' and not 'application by' the applicant.[122] He also argues that the term 'any person' used in the Constitution is quite different from the definite term 'the person'. Another argument of this type is that the term 'any person' should be read disjunctively from the word 'aggrieved'.[123]

Under the proviso of Article 153(3), if there is any conflict between the Bangla and English version of the Constitution, the Bangla version will prevail. The word used in the Bangla version is সংক্ষুব্ধ (sangkhubdha) - a term closer to 'concern' rather than 'aggrieved'. This unique argument was forwarded by Dr Mohiuddin Farooque in FAP 20 but was not accepted by the judges.[124] Apparently, the judges considered that the general meaning of the term in Bangla is different from its legal usage.

All these arguments, both conceptual and technical, tend to emphasise two points regarding the law of standing. First, the Court must follow the Constitutional directives and provisions rather than inherited traditions. Second,

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[121] Ishtiaq Ahmed (1993: 39) and Mahmudul Islam (1995: 511-512). Amir-ul Islam (1996: 8) compares the situation with the Constitution of Sri Lanka. Under Article 126(2), petitions for infringement of Fundamental Rights are available only to the person 'himself or by an Attorney-at-law on his behalf'.

[122] Amir-ul Islam (1996: 8).

[123] See the appellant's arguments in FAP 20 above note 32 at 11.

[124] *Id.*

these constitutional provisions indicate liberal rather than restrictive rules of interpretation.

4.4.4 Development of new rules of public interest standing: Cases in the High Court Division before FAP 20

In the process of gradual recognition of PIL, the idea of public interest standing has grown one step at a time. As the High Court Division examined the topic from a case to case basis, the judges resorted to a number of different sets of arguments. The line of argument adopted in any particular case depended on the facts and the aspects of *locus standi* in question. But the cases that actually examined the principles of *locus standi* and attempted to formulate new rules are extremely limited in number.

While discussing standing, the judges often followed the constitutional mandate and the conceptual guideline for PIL discussed in chapter 2.[125] Accordingly, once the element of 'public interest' was recognised, standing was allowed, totally disregarding the intricacies of standing in the private law. However, more elaborate discussion as to the meaning of 'person aggrieved' or 'sufficient interest' in public law can be found in a few cases including Welfare Association,[126] Parliament Boycott[127] and Justice Shahabuddin.[128]

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[125] See above chapters 2.4.5 and 2.4.6.

[126] Bangladesh Retired Government Employees Welfare Association v. Bangladesh 46 DLR (1994) 426.

[127] Anwar Hossain Khan v. Speaker of Bangladesh Sangsad Bhavan and others 47 DLR (1995) 42.

[128] Abu Bakar Siddique v. Justice Shahabuddin Ahmed and others 1 BLC (1996) 483.

4.4.4.1 Liberalising representative public interest standing: Welfare Association

In Welfare Association,[129] an association of retired government servants challenged a discriminatory law involving pensions. The government pleaded the traditionally accepted principle that an association can not represent its members in a writ. But in spite of the earlier authorities, the Court granted standing. However, it must be noted that even in the absence of the association as a party, it was a strong case because the co-applicants were aggrieved personally.[130]

The government relied on a number of traditional authorities from sub-continental jurisdictions including the leading case of Dada Match Worker Union and Sangbadpatra.[131] Petitioners pleaded the Indian PIL of DS Nakara and others v. Union of India[132] which was followed in Pakistan in IA Sharwani and others v. Government of Pakistan and others.[133] Sangbadpatra was simply ignored on the ground that the facts of the two cases are different and as such the principle set out in Sangbadpatra can not be applied. As regards the cases on representative standing, the judge apparently accepted the earlier authorities including Dada

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[129] Above note 126.

[130] The President and Vice President of the Association, who were retired government employees themselves, were petitioner Nos. 1 and 2 respectively.

[131] From the Bangladesh jurisdiction, other cases discussed were Khulna Shipyard Employees Union above note 78 and Zamiruddin Ahmed above note 78. The Pakistani case of Tariq Transport Company above note 65 was also examined.

[132] AIR 1983 SC 130. In this PIL, a society represented a large number of pensioners. Here as well, the co-petitioners were personally aggrieved and undoubtedly had standing.

[133] 1991 SCMR 1041.

Match Workers Union as establishing a general rule because he neither declared these authorities wrong nor overruled them. But he went on to create an exception. Scattered in the judgement are two broad tests used to determine *locus standi* in this exceptional situation.

The first test aims to detect a public interest standing. The judge argues that the Constitution is not a morbid document but a dynamic instrument capable of being interpreted and applied in the ever-changing socio-economic circumstances.[134] While so doing, the judiciary is bound to interpret the Constitution in favour of socio-economic justice. Thus when someone is unable to come to the Court due to poverty or otherwise, his representative should not be denied standing on merely technical grounds. He says:

> The judicial function is to interpret it in such a way as to meet the socio-economic needs of those who are incapable, on account of poverty or otherwise, to seek assistance of the court which exists for safeguarding the rights and interest of all citizens.[135]

If a Fundamental Right is not enforced and a citizen is kept in perennial suffering, the Court will fail to discharge its constitutional obligation. So the 'pedantic and lexicographic' interpretation of the words 'person aggrieved' must be avoided if there is no conflict with any specific provision of the Constitution.

The second test in determining standing is that as long as an association looks after the welfare and common interest of its members "it is entitled to ventilate this interest before this Court in the form of public interest litigation".[136]

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[134] Welfare Association above note 126 at 435.

[135] *Id.*

[136] *Ibid.* at 434.

This is so because it is an absurd proposition to suggest that each individual member must come forward and file a separate writ.

Apparently, if the above tests yield positive results, an applicant will be granted *locus standi* as an exception to the general rule of representative standing. Since the earlier restrictive decisions were not overruled, the liberalisation in Welfare Association is limited in its scope. It must also be remembered that the association in this case was not representing the poor or helpless and the co-applicants had standing anyway.

Naimuddin Ahmed J considered Sangbadpatra with much caution. As a High Court Division judge, he could not contradict or overrule Sangbadpatra. It was generally assumed, when Welfare Association was decided, that Sangbadpatra supports traditional representative standing and restricts PIL.[137] Naimuddin Ahmed J's strategy was to refuse to discuss Sangbadpatra on the ground that the facts of the two cases are not similar and as such there is no need to follow the Sangbadpatra principle. But the difference between the two cases is not made clear. This absence of clarification restricted the scope of the principles established in Welfare Association.

The distinction between Sangbadpatra and Welfare Association lies in the fact that *locus standi* is a mixed question of fact and law. The Court has a discretion to grant standing taking into consideration the circumstances in each case. Thus a group of opulent Newspapers owners do not have the same status as a group of old middle-class pensioners. The Court itself failed to expressly inform

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[137] See Syed Mahbub Ali above note 106 and Raufique (Md) Hossain above note 109.

us that it was exercising its discretion. In FAP 20, this issue has been clarified while appreciating the decision in Welfare Association.[138]

4.4.4.2 Recognising citizen standing: Parliament Boycott

In Parliament Boycott,[139] when the opposition MPs started continuous abstention from parliamentary sessions, a *mandamus* was brought by an advocate claiming to represent the rights of the public. He claimed that this mass abstention is anti-constitutional and the MPs must go back to the Parliament and pay back all the salaries and other allowances received during the period of their unauthorised absence. The petitioner came as a citizen and voter. He claimed that the MPs represent the whole nation and as such any constitutional breach of violation committed by any member of Parliament can be questioned by any citizen. It was argued that he was not a 'person aggrieved' under Article 102.

While granting standing, as we have already discussed in chapter 3, Qazi Shafiuddin J canvassed liberal rules to interpret the Constitution and relied on the 'people's power' idea.[140] He discussed the Preamble and Article 7 and pointed out that all powers of the Republic are the powers of the people delegated to relevant authorities. These authorities must exercise this power constitutionally. If there is any violation, any citizen can challenge this since he is a source of power along

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[138] ATM Afzal J (FAP 20 above note 32 at 4), however, reserved further comments since an appeal from Welfare Association is pending in the Appellate Division.

[139] Above note 127.

[140] *Ibid.* at 45-46. For the role of 'peoples power' idea in constitutional interpretation, see above chapter 2.4.6.

with all other citizens of the country. This is all the more so because under the Preamble, it is the people of Bangladesh who are to safeguard, protect and defend the Constitution.

This case apparently argues that there should be no standing requirement at all in cases of Constitutional violation when the entire public is affected. This is a wide concept and the only real restriction seems to be the discretion of the judge to ascertain whether or not there has been a constitutional violation. Still this case did not touch all the aspects of public interest standing. One such limitation is that it applies only to constitutional Fundamental Rights and not to legal rights. Similarly, this case is no authority for cases where someone, whose own Fundamental Rights are not in question, brings a writ for a person or class or persons.

There are reasons why this case was not taken immediately as an authority for the introduction of PIL. The concept of PIL as such was not discussed. In fact, it was a highly criticised judgement and was immediately stayed pending an appeal.[141] Later, due to change in the political circumstances, the case became infractuous. But the 'people's power' argument was later adopted and expanded in FAP 20. Finally, it must be noted that although the Berubari principle of 'constitutional issue of grave importance' could be applied in Parliament Boycott, it was not even mentioned. In fact the principle in Parliament Boycott appears to be wider than in Berubari, but the arguments are not the same.

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[141] See above chapter 3.7.1.

4.4.4.3 Application of the Berubari principle relating to 'constitutional issue of grave importance': The case of Justice Shahabuddin

The Berubari principle, liberal standing rule where a constitutional issue of grave importance is concerned, was faithfully followed in Justice Shahabuddin.[142] A citizen challenged the assumption of the office of the President by former Chief Justice Shahabuddin Ahmed on the ground that a retired judge can not hold any office of profit in the service of the Republic. The applicant's standing was disputed.[143]

Md Mozammel Hoque J first expanded the meaning of 'person aggrieved'. He said:

> Article 102 of the Constitution provides that a person who is aggrieved may file an application under Article 102(2) of the Constitution. But it does not provide that a person should be personally aggrieved. If the Constitution provides personal aggrievement, then the scope of Article 102 would be narrower.[144]

He agreed with the petitioner's contention that the term 'aggrieved' may be used to express different meanings. Thus a grievance may be personal, constitutional, mental, economic, political or social. Article 102 shelters a person in any kind of aggrievement.

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[142] Above note 128.

[143] The writ, as appears from its cause title and prayer, was filed as *quo warranto*. The respondents vehemently argued that it was pre-mature since Justice Shahabuddin Ahmed had not even taken oath of office. The judge refused to deny the writ on this technical question alone and decided to treat the petition as *certiorari* and proceeded to hear the parties. Hence the relevancy of the issue of standing.

[144] Justice Shahabuddin above note 128 at 488.

On this issue, the Court rightly refused to follow Sangbadpatra because it related to representative standing and the facts and circumstances were different. The Court considered the facts of the case in determining standing and emphasised the importance of the questions involved. The President is the Head of the State and symbol of unity of the entire country. If any constitutionally disqualified person becomes President, it will touch and affect each and every citizen of Bangladesh.[145] So it was undoubtedly a very important constitutional issue. The Court, after discussing Berubari, said:

> Following the aforesaid principle enunciated by the Supreme Court we hold that since several constitutional question of great public importance having far-reaching consequences are involved in the present case, the present writ petition is maintainable.[146]

Thus the Court followed Berubari entirely. SP Gupta was examined with approval but PIL as a concept was not discussed as such.[147] In terms of principles, nothing new was introduced except a recognition that the term 'aggrieved' is wider than personal grievance. But in terms of judicial practice, this is the first case that actually used the Berubari principle without any qualifications.

In fact, Justice Shahabuddin was decided a month after FAP 20, but the Advocates failed to supply a copy of the FAP 20 judgement.[148] So it remains the last of the cases where the High Court Division judges gradually developed

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[145] *Id.*

[146] *Ibid.* at 489.

[147] *Ibid.* at 488.

different aspects of public interest standing, carefully avoiding the restrictive authorities including Sangbadpatra.

4.4.5 Formulation of the rules for public interest standing in FAP 20

The 'public interest rules of interpretation of the Constitution' were finally established in FAP 20.[149] The result has been a consensus that the entire Constitution must be taken to interpret any specific provision and since the Constitution mandates social justice and upholds 'people's power', PIL can not be denied. On the basis of these rules of interpretation, the four judges of the Appellate Division gave their separate explanations of public interest standing. The words used, the ideas expressed and the principles established by them are more or less the same.[150] An excerpt from the leading judgement delivered by Mustafa Kamal J is representative of all the four versions:

> . . . when a public injury or public wrong or infraction of a fundamental right affecting an indeterminate number of people is involved it is not necessary, in the scheme of our Constitution, that the multitude of individuals who have been collectively wronged or injured or whose collective fundamental right have been invaded are to invoke the jurisdiction under Article 102 in a multitude of individual writ petitions, each representing his own portion of concern. In so far as it concerns public wrong or public injury or invasion of fundamental rights of an indeterminate number of people, any member of the public, being a citizen, suffering the common injury or common invasion in common with others or any

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[148] The date of FAP 20 judgement is 25 July while Justice Shahabuddin was decided on 19 August. But the FAP 20 judgement became available for the lawyers only in November and was reported in January 1997.

[149] See above chapter 2.4.6.

[150] See FAP 20 above note 32 at 4, 19, 26 and 31 for the different versions formulated by ATM Afzal CJ, Mustafa Kamal J, Latifur Rahman J and BBR Choudhury J respectively.

> citizen or an indigenous association as distinguished from a local component of a foreign organisation, espousing that particular cause is a person aggrieved and has the right to invoke the jurisdiction under Article 102.[151]

These new rules have several significant aspects.

The 'person aggrieved' rule is an invention of the private law and not of public law. Latifur Rahman J explains that the traditional rules requiring the petitioner to be personally aggrieved is based on the theory that the remedies and rights are co-relative and therefore only a person whose own right is violated is entitled to seek remedy.[152] However, if this doctrine is followed strictly in public law, it will be tantamount to ignoring the good and well-being of the citizens in many cases, especially poorer sections of the society. It must also be taken into consideration, as has been noted by BB Roy Choudhury J, that the Constitution neither defines the term 'person aggrieved' nor requires the applicant to be personally aggrieved.[153]

Thus whenever a dispute is in question, the Court must determine whether the petitioner is espousing an individual cause or a public cause.[154] If an individual cause is espoused, the petitioner needs to be a person aggrieved and his own interests require to be affected. If, however, he pursues a public cause involving public wrong or public injury, he need not be personally affected.

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[151] *Ibid.* at 19.

[152] *Ibid.* at 22-23.

[153] *Ibid.*at 29 and 31.

[154] *Ibid* at 19.

So it appears that the traditional law of private interest standing, which is rather conservative, is not touched by FAP 20. Mustafa Kamal J says: "The traditional view remains true, valid and effective till today in so far as individual rights and individual infraction thereof are concerned."[155] As a result, since Sangbadpatra was a case of private cause, there was no need to overrule it. FAP 20 creates a new set of rules only for public interest standing where a public cause is espoused. Interestingly, Mustafa Kamal J observes that Sangbadpatra was not an authority even for the proposition that an association can never be a person aggrieved if it espouses the causes of its members in a representative capacity.[156] This may be taken as a hint that even in private interest standing, the Court is prepared to rule more liberally in future.

A question arises as to whether 'public cause' involves only pre-defined and easily determinable rights. There are many cases of violation or breach of such a nature that a wrong or injury to the public is apparent but the corresponding right is diffused or very thinly spread. The Appellate Division rightly stressed on the violation, breach, wrong or injury rather than the right itself.

Thus in the leading judgement, Mustafa Kamal J emphasises not on public right but on 'public wrong or public injury or invasion of Fundamental Rights'.[157] Afzal CJ grants standing in cases of 'breach of public duty or for violation of

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[155] *Id.*

[156] *Ibid.* at 17.

[157] *Ibid.* at 19.

some provision of the Constitution or the law'.[158] Latifur Rahman J merely requires public wrong or public injury.[159] BB Roy Choudhury J is concerned with 'wrong done by the Government or a local authority in not fulfilling its constitutional or statutory obligations'.[160]

This also clarifies another important aspect - public interest standing is not limited to constitutional rights. Latifur Rahman J explains:

> The operation of Public Interest Litigation should not be restricted to the violation of the defined Fundamental Rights alone. In this modern age of technology, scientific advancement, economic progress and industrial growth the socio-economic rights are under phenomenal change. New rights are emerging which call for collective protection and therefore we must act to protect all the constitutional, fundamental and statutory rights as contemplated within the four corners of our Constitution.[161]

Once it is established that a public cause is involved, that 'cause' will be a determining factor as to the competency of the applicant to claim a hearing. It is a question of fact to be decided by the Court. In case of citizen standing, it is enough for the petitioner to show an interest or concern common with the general public. But in cases of representative public interest standing where the petitioner is espousing the cause of a vulnerable section of the society, he must show that his concern is real and not illusory.

While Mustafa Kamal J does not use the term, Latifur Rahman J requires 'sufficient interest' from the petitioner.[162] Afzal CJ says:

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[158] *Ibid.* at 4.

[159] *Ibid.* at 26.

[160] *Ibid.* at 31.

[161] *Ibid.* at 28.

[162] *Ibid.* at 26.

> The liberal interpretation given to the expression any person aggrieved in the judgements of my learned brothers, in my opinion, approximates the test of or if the same is capsulized, amounts to, what is broadly called, 'sufficient interest'.[163]

He subscribes to the scope of 'sufficient interest' as explained by Bhagwati J In the leading Indian case of SP Gupta, making it clear that the scope of 'sufficient interest' in Bangladesh is more or less the same as in India.

Since 'sufficient interest' essentially depends on the co-relation between the matter brought before the Court and the person who is bringing it, it is not possible to lay down any strait-jacket formula applicable to all cases. It is the responsibility of the Court to exercise its discretion wisely in determining this issue. None of the judges propose any specific test of 'sufficient interest'.[164]

In ordinary situations, the affected party itself is required to come to the Court. So in cases of representative public interest standing, the Court will enquire as to why the affected party is not coming before it. Also, a person pleading sufficient interest may be able to cross the threshold stage but the respondent is free to contest this claim on the facts of the case or question whether the petitioner's intentions are *bona fide*.

The question of the petitioner's intention is very important in PIL since it is the most potent weapon for the Court to check meddlesome interlopers. Giving appropriate emphasis on this point, Mustafa Kamal J says:

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[163] *Ibid.* at 4.

[164] See Harding (1989: 216) to compare this with the English case of IRC. The judges in that case proposed a bewildering number of tests, for example, whether the applicant has a genuine grievance reasonably asserted, whether he is within the scope or ambit of the duty or whether he is given by the statute any express or implied right.

> The High Court Division will exercise some rules of caution in each case. It will see that the applicant is in fact espousing a public cause, that his interest in the subject matter is real and not in the interest of generating some publicity for himself or to create mere public sensation, that he is acting *bona fide*, that he is not a busybody or an interloper, that it is in the public interest to grant him standing and that he is not acting for a collateral purpose to achieve a dubious goal, including serving a foreign interest.[165]

This caution has been re-iterated by the other judges as well.[166] Even in traditional cases, a petitioner was required to have *bona fide* interest. The new situation only demanded a greater emphasis on this point.

Rules laid down in FAP 20 demonstrates that since the intention of the petitioner is relevant, his standing depends largely on the merit of the case. This strengthens our argument that frivolous and politically motivated cases brought by the élite to further their own interests actually damaged the development of public interest standing. While the judges were refusing the élite the right to use the judicial arena in the name of the people, it was often wrongly assumed that they were denying a PIL approach. Especially, confusions arose because public interest standing was a new concept and in a state of initial development. As a result, it took a long time to find an appropriate case, the FAP 20, and establish public interest standing.

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[165] FAP 20 above note 32 at 19.

[166] *Ibid.* at 4, 26 and 31 by Afzal CJ, Latifur Rahman J and BB Roy Choudhury J respectively.

4.5 Standing rules in Bangladesh with respect to *habeas corpus* cases

4.5.1 Habeas corpus under the Constitution of Bangladesh

While clauses 1 and 2(a) of Article 102 are the centre of controversy due to the presence of the term 'person aggrieved', there is no such barrier for clause 2(b). This includes remedies in the nature of *habeas corpus* and *quo warranto*.

In Bangladesh, mainly due to the presence of autocratic regimes, the law relating to *habeas corpus* is regarded as a most important constitutional issue.[167] The Constitution guarantees right to life and liberty as Fundamental Rights under Article 31 and 32. Article 33 provides safeguards as to arrest and detention. Although there was no provision of preventive detention in the original Constitution, the oversight was quickly corrected by the majority party in 1973 by amending Article 33.[168] This was followed by the notorious Special Powers Act in 1974.[169] These laws in combination with the oppressive periods of martial law proved to be devastating for the protection of the right to liberty.[170]

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[167] In Bangladesh, due to the importance of the topic, there is no dearth of literature on personal liberty and preventive detention. See S Malik (1993: 41-57) for a short analytical overview. A more detailed recent study by QR Hoque (1995) traces the historical and analytical development of the law. He argues that the existing penal laws can deal more efficiently with the matters covered by preventive detention laws which were introduced to satisfy the whims of the authoritarian regimes. See also the analysis by Bari (1988: 53-79) as to preventive detention during Martial Law periods and by Patwari (1988) on the comparison of the laws of Bangladesh, India and Pakistan.

[168] Constitution (Second Amendment) Act (XXIV of 1973), section 3.

[169] Act XIV of 1974.

[170] Constitutionally approved preventive detention statutes form the most important and problematic aspect of *habeas corpus* in the sub-continent. See PS Jaswal (1993: 71-103) for an overview of the Indian situation and Faqir Hussain (1989) for the case of Pakistan.

The judges responded by taking a very wide view of interpretation. In fact, the Court introduced so many exceptions to the general rules and required such stringent criteria to be fulfilled that once a detenue managed to come before a Court, he had a very good chance of being released. As a result of the Supreme Court's interpretations of various provision of the Special Powers Act, "it has become exceedingly difficult for the Government to sustain an order of preventive detention".[171] According to QR Hoque, from 1972 till March 1995, the total number of *habeas corpus* petitions filed was 10,372.[172] Out of these, detainees were released by the Court in 78.3% cases. In a further 9.47% cases, the detainees were presumably set free by the authority after the initial rule of the Court and before the final hearing. It appears that considering the circumstances, the Supreme Court performed very well.

Even in the traditional law, the principles of standing in *habeas corpus* are quite liberal.[173] Although there is no hard and fast rule, it is generally expected that the detenue himself should be the petitioner. But the detenue is often unable to act due to the nature of his detention. In such a case a person other than the detenue can come before the Court. But the Court insists that the petitioner is acquainted with the facts and circumstances of the case.

When the detenue is unable to come to the Court, the proper person to file a petition is any of his relations. Thus, in Bangladesh, a mother was allowed to

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[171] S Malik (1993: 57)

[172] QR Hoque (1995: 216: 221).

[173] See above chapter 4.1.2.

apply for her son,[174] and a wife for her husband.[175] In absence of a relation, a friend was allowed to apply.[176] In these Bangladeshi cases, however, standing was taken for granted and was not contested.[177] In case of a minor, the applicant must either be entitled to its custody or be interested in its welfare.

Application by a total stranger is said to be allowed only in the rarest of cases where the Court has been apprised of material which immediately and obviously establishes the illegality of the detention or custody.[178] There is always a possibility that if a stranger is allowed to apply on the detenue's behalf, there will be an abuse of the process of the Court. Complication may arise if, after the Court's refusal of the stranger's petition, the detenue applies himself claiming that the first petition was made without authority. Thus the Court has discretion to ask whether the application made by a stranger is reasonable under the circumstances of the particular case.

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[174] Aruna Sen v. Bangladesh 27 DLR (1975) 122.

[175] Nasrin Kader Siddiqui v. Bangladesh 44 DLR (AD) (1991) 16.

[176] Dheman Chakma v. Secretary, Ministry of Home Affairs and others (1991) unreported WP 3276/1991.

[177] The authority for the Bangladeshi judges, it appears, is Azizul Huq v. East Pakistan PLD 1968 Dac 728, a case decided in the Dhaka High Court during the Pakistani period. See also Chiranjit Lal Chaudhury v. Union of India above note 49 for the leading Indian authority.

[178] Ram Kumar v. District Magistrate AIR 1966 Punj 51. Sundarajan v. Union of India AIR 1970 Del 29.

4.5.2 Impact of PIL on standing in *habeas corpus*

Because of the already liberal rules relating to *habeas corpus*, the public interest approach faced no major bar in such matters and the task was to expand the scope of standing even more. But progress in this respect in Bangladesh has been very slow. As we have already seen in chapter 3, personal liberty and preventive detention cases advanced from a PIL perspective are very few in number. Arguing public interest, progress may be made in at least three ways.

First, the definition of personal liberty may be widened thereby granting standing in previously unrecognised cases. Thus in Ayesha Khanam and others v. Major Sabbir Ahmed and others, [179] the Court declared that Article 102 (2) (b) (i) applies not only to detention by the authority but also to cases of private detention.

Second, the Court may take a more liberal view as to whether a stranger should be allowed to proceed in a particular case. This is a question of fact and success depends largely on the genuineness of the claim. In Ayesha Khanam, a voluntary organisation was petitioner No. 1 and helped the mother, petitioner No. 2, to file the case. The Court is yet to decide a case where a stranger applies for a detenue relying solely on PIL arguments. But since PIL has now been recognised in principle in FAP 20, it appears that the Court will decide liberally rather than

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[179] 46 DLR (1994) 399. A minor son, abducted by the father, was given back to the mother. This decision has been recently followed in Sharon Laily Begum Jalil v. Abdul Jalil and others 48 DLR (1996) 460.

conservatively.[180] In entertaining such a case, the Court will consider the circumstances of the case.

Third, the Court may liberalise, on grounds of public interest, the procedural aspects of standing in *habeas corpus*. Thus in Alam Ara Huq v. Government of Bangladesh,[181] a detenue was re-arrested twice within the jail compound after successive orders of release by the Court. The third time, the detenue was brought personally before the Court and was released from the Court premises itself.

The Indian and Pakistani Courts have long overlooked the procedural formalities and treated telegrams, letters and other communications as writ petitions.[182] In Bangladesh, there are only two such examples: Nazrul Islam[183] and Eliada.[184] Nazrul Islam was detained without trial for 12 years and as such the public interest element in that case was very strong. In the second case, the judge proceeded on the wrong assumption that Eliada, accused of drug-trafficking, was underage at the time of trial. In both these cases, the judge treated Newspaper reports as writ petitions and acted *suo moto*. But in these

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[180] See also obiter in Ayesha Khanam above note 179 at 401.

[181] 42 DLR (1990) 98.

[182] In India, the practice started in the early 1980s. See Sunil Batra II v. Delhi Administration AIR 1980 SC 1579 and Ichhu Devi v. Union of India AIR 1980 SC 1983. In Pakistan, the leading case is Darshan Masih v. the State PLD 1990 SC 513.

[183] State v. Deputy Commissioner, Satkhira and others 45 DLR (1993) 643.

[184] Eliadah McCord v. State 48 DLR (1996) 495.

judgements, the judges did not feel it necessary to explain the validity or legality of such a *suo moto* action.

Nazrul Islam and Eliada enables us to draw several conclusions. First, there is no bar for the Bangladeshi Court to ignore procedural formalities in *habeas corpus* petitions. Second, the law is already established and does not need to be contested, argued or confirmed. The power of the Court is taken for granted. Third, as regards the application of new liberal principles, the already established rules from India and Pakistan may be freely borrowed. Fourth, the activation of the Court will depend on the gravity of the situation and the genuineness of the circumstances.

Nazrul Islam is an important PIL case, but it failed to create a trend. This is despite the fact that in the constitutional development of Bangladesh, personal liberty is the area where the Supreme Court demonstrated its most resolute stance for the rule of law. One reason was that social activists and organisations were rarely engaged in this field. Also, the Court was already operating under a highly tense political situation where the re-emergence of democracy was supported by the judges through a series of bold political decisions. They were apparently too careful not to clash with the authorities in a new front. It may be argued, however, that the real reason is the lack of activist stance by the judges, because even after the establishment of democracy, examples of PIL approach in *habeas corpus* petitions remain extremely rare.

4.6 Standing rules in Bangladesh with respect to *Quo warranto* cases

We have already discussed that the traditional English standing rules regarding *quo warranto* and the relevant Indian and Pakistani law are quite liberal.[185] The main reason is that the enquiry relates to a matter in which the public are interested. Subject to the discretion of the Court, the remedy is available to private persons. There is no requirement for the petitioner to be an aggrieved person or to show that he has a legal right or personal interest in the matter. Due to the very nature of this liberal rule, there is a possibility of vexatious proceedings or cases by troublemakers with *mala fide* intentions. So the test of the bonafides of the petitioner is very important in *quo warranto* matters.

Article 102 (2)(b) (ii) of the Constitution of Bangladesh, while formulating the remedy in the nature of *quo warranto*, did not deviate from these traditions. The High Court Division dealt with the question in the leading case of Sikder Mohammad Faruque v. Md Mostafa Hossain and another[186] where a person holding the office of the chairman of an Upazila Parishad (local council) was challenged. The petitioner, having never been a candidate for the challenged office, had no personal direct interest as such. His standing was disputed. Mahmudur Rahman J granted *locus standi* relying on R v. Speyer and the Indian and Pakistani authorities that followed it. Since the petitioner seeks to vindicate the right of the public in general and not his personal interest, he must have

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[185] See above chapters 4.1.2, 4.2.1 and 4.2.2.

[186] 7 BLD (1987) 52.

standing unless there is some other equally efficacious remedy available.[187] On the *bona fides* of the petitioner, Mahmudur Rahman J said:

> The grant of relief in a writ jurisdiction is a matter of discretion and the High Court Division in issuing of such a high prerogative writ is within its province to test the bonafide of the relator in order to see whether he has come with a clean hand for the reason that a writ of quo-warranto is not to issue "as a matter of course on sheer technicalities on the doctrinaire approach".[188]

On appeal, the decision of the High Court Division was upheld.[189] In the leading judgement, Shahabuddin Ahmed J discussed English, Indian and Pakistani authorities and said:

> It is clear that for issuing of a writ of quo-warranto no special kind of interest in the petitioner is required, nor is he required to show that he is personally aggrieved at the holding of office by that person.[190]

The public interest element is made even more clear when he says:

> . . . there is no room to entertain any doubt as to the maintainability of a writ petition by any citizen who questions the title to office of any person who is, or purportedly, holding a public office whenever it is found that the said functionary is disqualified from holding the office and the Court in its extra-ordinary jurisdiction will entertain the petition and examine the question on merit.[191]

Thus the law is now well-settled. The clarification by the Appellate Division did not create any new principle. But the viability of using *quo warranto* for public interest purposes was clearly indicated.

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[187] *Ibid.* at 59.

[188] *Ibid.* at 60.

[189] Md Mostafa Hossain v. SM Faruque and another 7 BLD (AD) (1987) 315.

[190] *Ibid.* at 319.

[191] *Ibid.* at 320.

This opportunity was grabbed by the political activists as Mostafa Hossain broke down a psychological barrier and enabled them to challenge even the most highly placed offices of the Government. In fact, Mostafa Hossain was followed by almost 20 reported cases where they challenged holding of offices by the President, Vice-President, Supreme Court judges, government officials and elected representatives.[192] The *locus standi* of the petitioner was not disputed at the threshold in any of these cases. The standing rules in *quo warranto* were already developed, in pre-PIL cases including Mostafa Hossain, to such an extent that the new PIL approach could be facilitated without incorporating new principles.

In the present chapter, we have analysed the impact of PIL on the standing rules in judicial review petitions. Our discussion demonstrates that initially, the judges were reluctant to recognise public interest standing. Since standing is a mixed question of fact and law, one reason of the failure of the repeated attempts by the petitioners has been the lack of cases with genuine public interest issues. Gradual recognition of public interest standing is the result of relentless pressure by the petitioners combined with a few cases involving the welfare of the people.

However, once the threshold problem of standing is answered and the case is admitted and heard, the Court has an even more difficult problem to solve. The demand of PIL to ensure justice through judicial intervention means that the Court is often asked to re-define the boundaries that separate the traditional areas

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[192] Chapter 3 catalogues the gradual development of these cases over the years. For analysis of the effect of these cases on particular constitutional provisions, see chapter 5.3.2.

of the three organs of the government. The next chapter analyses specific constitutional provisions to explore the extent to which the élite have used the techniques of PIL to participate in the power-relations debate.

Chapter 5
Use of PIL in re-defining power-relations and the limits of judicial power

Apart from the threshold problem of *locus standi*, as has been discussed in the previous chapter, a main problem of the development of PIL in Bangladesh is the use of the techniques of PIL by the élite to take part in the power-relations debate. Political and constitutional activists, in a considerable number of PIL cases, have approached the Supreme Court to challenge the jurisdictional boundaries that separate the areas of the various organs of the government.

In the Bangladeshi context, these challenges raise several questions. What are the specific constitutional provisions challenged by the PIL-petitioners? What have been the effects of such challenges on the constitutional arrangement? Has there been any enhancement of the status of the judiciary vis-à-vis other governmental departments? Is the judiciary, by developing new implementation procedures, encroaching upon the province of the executive? The present chapter discusses these issues and demonstrates that the judges and lawyers are pre-occupied with the concerns of the privileged few and there has been little or no benefit for the common people.

While challenging supposed violations of the constitutional arrangement, the PIL-petitioners rely upon the so-called scheme of 'separation of powers', which is regarded as a fundamental feature of the Constitution of Bangladesh.

As the guardian of the Constitution, it is the duty of the Supreme Court to define and protect the power-separation scheme. But the political activists often raise so-called 'political questions' and make it difficult for the Court to project its neutral image. In the first part of the present chapter, we analyse the stance of the Supreme Court of Bangladesh on these issues. Our analysis demonstrates that despite the Court's attempt to project a neutral image, the influence of the continuing power struggle in the national politics is often reflected in its actions and decisions relating to PIL cases.

The next part of the chapter discusses PIL cases involving jurisdictional limits of the legislature. In relation to judicial review of statutes and the Constitution, the political activists have actually failed to use the Supreme Court to hinder the law making power of the parliament. Our discussion also illustrates that they were not concerned with with socio-economic matters but with laws involving power sharing arrangements. However, there has been some success in defining the scope of the proceedings and privileges of the Members of Parliament.

Finally, the chapter discusses PIL cases involving the domain of the executive vis-à-vis the judiciary. By focusing on the definition of the term 'state', we analyse whether social and economic justice considerations of PIL have expanded this definition resulting in more areas being amenable under the writ jurisdiction. Use of PIL by the constitutional activists to protect the judiciary from supposed executive encroachment has also been analysed,

especially in relation to appointment, promotion and transfer of acting and retired judges. Finally, the chapter includes an analysis of the judicial attempts of implementation of PIL that appear to encroach upon the executive's area of activities.

5.1 Stance of the Bangladeshi courts on the doctrines of 'separation of powers' and 'political questions'

As constitutional litigation, success of PIL is closely connected with the scheme of 'separation of powers' envisaged by the Constitution. One aspect of this issue is that such a scheme enhances judicial independence and status and thus indirectly makes it easier for the judges to pursue social or economic justice matters. Another aspect is that since the judiciary is the final adjudicator on constitutional questions, the judges are often asked to protect any violation of the power-separation scheme. This very important role of the judiciary, however, has the potential to weaken its position as it often involves cases relating to political questions tending to politicise the judges. It is difficult for the judges to be PIL activists when the judiciary is politicised and involved in controversies. The present sub-chapter analyses the stance of the Supreme Court of Bangladesh on the issues of 'separation of powers' and 'political questions' and explores to what extent the Court's views has been influenced by the politically motivated PIL cases.

The principle of 'separation of powers' has been declared a fundamental and basic feature of the Bangladeshi constitutional scheme.[1] In accordance with this principle, the Constitution seeks to achieve a balance ensuring that the legislative, the executive and the judicial powers of the government are separated into three organs, that each organ is limited to its own sphere and that within the designated area of operation, each is independent and supreme.[2]

The constitutional basis of this separation seems to rest on Article 7.[3] It says that sovereignty and all powers belong to the people and exercise of all powers on behalf of the people shall be effected only under and by the authority of the Constitution. This makes the Constitution supreme as opposed to any particular organ.[4] It also aims to ensure that as regards the three main governmental departments, none is superior than the others. The Constitution has assigned and distributed powers of the Republic to the three departments of the

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[1] Of all the features of the Constitution declared to be basic, separation of powers has been considered as one of the more important ones in Anwar Hossain Chowdhury v. Bangladesh (8th Amendment case) 1989 BLD (Spl.) 1 at 110 and 156.

[2] The meaning of the term 'separation of powers' is the same in Bangladesh as it is understood in general constitutional law - there is no special or different definition. Shahabuddin Ahmed J says in the 8th Amendment case *ibid.* at 156: "Principle of separation of powers means that the sovereign authority is equally distributed among the three organs and as such one organ cannot destroy the others."

[3] For the full text of Article 7, see above chapter 2.4.1. See also Mahabub Murshed (1997: 50-54) for a recent discussion on the relevent articles of the Constitution of Bangladesh.

[4] Article 7 is unique in the sense that neither the Indian nor the Pakistani Constitution has a similar Article declaring constitutional supremacy. However, although this Article emphasises the point, such supremacy is automatically preserved in a written Constitution whether or not expressly declared.

government providing that they can not transgress the limits prescribed or encroach upon each other's territory. Article 65(1) vests the legislative powers of the Republic in the Parliament while Article 55(2) provides that the executive power of the Republic shall be exercised by or on the authority of the Prime Minister.[5] Although there is no express vesting of judicial power, it is considered a well-established rule of construction that such an absence makes no difference.[6] The reason is that the Constitution has adopted the pre-existing governmental structure and has allowed the previously functioning Court to continue its operation.[7]

With respect to power-separation, the judiciary is perhaps the organ that requires most a well-balanced scheme. Judicial independence and, as a consequence, social and collective justice depend on it. This need has been recognised in Article 22 of the Constitution:

> The State shall ensure the separation of the judiciary from the executive organs of the State.

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[5] Article 55(2) originally provided that the power was to be exercised by the Prime Minister. This provision was amended when the Presidential form of government was adopted by the Constitution (Fourth Amendment) Act (No. II of 1975). But as a result of the re-introduction of the parliamentary system, the Article has now been restored in its original form by the Constitution (Twelfth Amendment) Act (No. XXVIII of 1991).

[6] See Mustafa Kamal (1994: 17-18) for a discussion in the Bangladeshi context.

[7] Continuity of the services of the Justices from the pre-constitutional Courts to the Bangladesh Supreme Court, and the transfer of legal proceedings accordingly, was provided in paragraph 6 of the Fourth Schedule of the Constitution. It has been declared in Mujibur Rahman v. Bangladesh 44 DLR (AD) (1992) 111 at 128 that the constitutional omission to expressly confer judicial power does not effect the Courts' power because ". . . they have been previously existing and the Constitution allows them to function, although in a new form".

With regard to the Supreme Court, the constitutional court of the Republic, Article 94(4) says that, subject to the provisions of the Constitution, the Chief Justice and the other judges shall be independent in the exercise of their judicial functions. Similarly, Article 116A says about the subordinate judiciary that, again subject to the provisions of the Constitution, all persons employed in the judicial service and all magistrates shall be independent in the exercise of their judicial functions.

While the sphere of activities of the judiciary is constitutionally protected, it has the further important responsibility to see that functionaries of the State do not overstep the limits of their power. The Appellate Division has declared that the actions of the parliament and the executive are to be watched by the Supreme Court 'as the guardian of the Constitution'.[8] This is due to the fact that in every system of government having a written Constitution, the function to finally determine its meaning and scope must be located in somebody or some authority.

The judges are careful to emphasise that the power to interpret the Constitution does not make the judiciary a superior organ. Qazi Shafiuddin Ahmed J, delivering a PIL judgement, said:

> It is worth to mention that the power to interpret the Constitution has been allotted to the superior Courts for safeguarding, preserving and upholding the Constitution. Really this power does not give to the court any practical or real omnipotence but to see if the other functionaries of the Republic are well within their bounds or are transgressing their limits and by Article 102 of the Constitution the

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[8] First Constitutional Reference (MPs Reference) 1995 (III) (Special issue) BLT 159 at 204.

> power may be exercised to keep the functionaries well within their bounds.[9]

The judiciary is neither above the Constitution nor does it have a higher jurisdiction and despite the delicate task of ensuring compliance with the provisions of the Constitution by all the governmental departments, it is seen as a co-ordinate and co-equal organ with the other two departments. However, although not omnipotent, the high status of the judiciary under the Constitution is apparent from the declaration of the principle of separation of powers in Articles 22, 94(4) and 116A of the Constitution. As 'guardian of the Constitution' and final arbitrator of constitutional issues, the judiciary has considerable power at its disposal.

It must also be noted that the separation of powers incorporated in the Constitution is somewhat flexible, especially in comparison with the US Constitution, the Constitution of Bangladesh is considered less rigid.[10]. Most notably, the executive power of the Republic is exercised in Bangladesh by the Prime Minister who is a member of the parliament commanding the support of the majority of parliament members.

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[9] Anwar Hossain Khan v. Speaker, Jatiya Sangsad (Parliament Boycott) 47 DLR (1995) 42 at 48. The issue was also raised in another PIL, Raufique (Md) Hossain v. Speaker, Bangladesh Parliament and others (MPs Resignation) 47 DLR (1995) 361 at 373-374, where the judge strongly emphasised that there is no conflict between the areas of activities of the judiciary and the parliament under the Bangladesh Constitution.

[10] MPs Reference above note 8 at 194 and 203 per Mustafa Kamal and Latifur Rahman JJ respectively. Mustafa Kamal J also points out that inherent in Article 22 is the acknowledgement that the separation has not been fully enshrined in the Bangladesh Constitution.

Constitutional recognition of the principle of separation of powers ensures judicial independence and thus strengthens the position of the constitutional activists. Any new or amended provision of the Constitution or law disturbing the power-separation scheme may be challenged on the ground that the spirit and letters of the Constitution have been violated. While so doing, political activists sometimes approach the Court when their efforts in the legislature and other forums have already failed. Hence, the challenges made are often attempts by the political and constitutional activists to re-adjust the power-relationship among governmental and public institutions through litigation. Our analysis of the development of PIL cases in chapter 3 already demonstrates that a considerable number of PIL cases in Bangladesh were actually brought either with political motives or the issues in question were politically controversial at the time. These cases tend to invite the 'doctrine of political question' - that the Court should refrain from entertaining certain matters because of their political nature.[11] The

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[11] Not every matter that is an issue in national politics or brought with political motive falls under the category of cases involving the doctrine of political question. The most widely accepted definition given by Brennan J in Baker v. Carr [1962] 369 US 186 217 says:

> "Prominent on the surface of any case held to involve a political question is found a textualy demonstrable constitutional commitment of the issue to a co-ordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due co-ordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

doctrine evolved with reference to the Constitution of the US and is seen as "a function of the separation of powers".[12]

In 1981, Kemaluddin Hossain CJ said in Dulichand Omraolal v. Bangladesh[13] that the Court should refrain from answering a political question if the validity or legality of the law could otherwise be decided. This does not, however, amount to an indirect recognition of the political questions doctrine. Recent observations made by the Appellate Division in MPs Reference[14] indicate that the Court is reluctant to rely on the doctrine.

There are several reasons why the doctrine is not followed. In the USA, the doctrine is based on, and is a consequence of, the rigid separation of powers. Since the Constitution of Bangladesh is based on a more flexible power-separation scheme, the doctrine is said to be not appropriate for the Bangladeshi situation.[15] It is also argued that the judiciary, as the guardian of the Constitution, is constitutionally obliged to decide constitutional disputes even if the issues involved have political overtones.[16] A failure by the judiciary to perform this constitutional duty would amount to giving limitless freedom to the governmental

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[12] *Ibid.* at 210.

[13] BLD (AD) (1981) 1 at 7-8. This case actually dealt with a problem dating back from the Pakistani period. The constitutional legitimacy of General Yahya Khan was questioned. In Pakistan, the Court found him a usurper in the famous case of Asma Jilani v. Punjab PLD 1972 SC 139.

[14] Above note 8 at 171-173. See also Mahmudul Islam (1995: 373-374) for similar arguments.

[15] *Ibid.* at 373.

[16] *Id.*

organs undermining the supremacy of the Constitution.[17] Finally, it has been observed that the doctrine has its problems in other jurisdictions as well.[18] In the USA, it has been critisised as vague and its importance seems to be in decline.[19] The courts in India regard the theory as incompatible with the scheme of the Constitution.[20] As a result, there is no definite and established set of rules to follow. After discussing the scope of the issue, Afzal CJ says: "there is no magic in the phrase 'political question'".[21]

Instead of the doctrine of political questions, the Supreme Court of Bangladesh favours the concept of judicial self-restraint - self imposed limitations on the exercise of judicial power.[22] Mahmudul Islam strongly advocates the view

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[17] The Indian Court has expressed the same view in Madhav Rao Scindia v. Union [1971] 3 SCR 9 at 75 where it was said that the constitutional mechanism in a democratic polity does not contemplate existence of any function which may *qua* the citizens be designated as political and orders made in the exercise whereof are not liable to be tested for their validity before the lawfully constituted courts.

[18] MPs Reference above note 8 at 172-173.

[19] The literature on the doctrine of political question reflects how difficult it is to reach a unanimous opinion. See for example: Tribe (1988: 96) - the doctrine is in a state of confusion; Loss (1987: 201) - the importance of the doctrine is declining; Henkin (1976: 597-625) - the case law shows that the doctrine is unnecessary in practice. However, the doctrine is still there, albeit in a limited form; see Mulhern (1988: 97-176).

[20] It was declared in AK Roy v. Union [1982] 2 SCR 272 at 296, that there is no place in the Indian Constitution for the doctrine since the power-separation scheme is not rigid. For examples of cases where the Court opted for the judicial self-restraint formula instead of political questions doctrine, see Dinesh Chandra v. Chaudhury Charan Singh AIR 1980 Del 114 at 116 and Madurai Adheena v. State of Tamil Nadu AIR 1984 Mad 241 at 245.

[21] MPs Reference above note 8 at 172-173.

[22] Mustafa Kamal (1994: 139-146) discusses in detail the rules to be followed by the Bangladeshi judges in exercise of self-restraint. Although it may be argued that the political questions doctrine is one of many that invoke judicial self-restraint, he does not include it in the list of restraining factors.

that there is no need to adopt and apply the doctrine of political question when judicial self-restraint can do the job in a more satisfactory way.[23] Similarly, ATM Afzal CJ said:

> While maintaining Judicial restraint the court is the ultimate arbiter in deciding whether it is appropriate in a particular case to take upon itself the task of undertaking a pronouncement on an issue which may be dubbed as a "political question".[24]

One aspect of the judicial self-restraint concept, impartiality, is taken very seriously. It was earlier said in the 8th Amendment case:

> Neither politics, nor policy of the government nor personalities have any relevance for examining the power of the Parliament under the Constitution which has to be done purely upon an interpretation of the provisions of the Constitution with the help of legal tools.[25]

The same view has been expressed in a number of PIL cases. When the former Chief Justice's appointment as the President was challenged in Abu Bakar Siddique v. Justice Shahabuddin Ahmed,[26] the Court explained that the petitioner has not shown respect and honour to the President less, but has shown respect for rule of law, supremacy of the Constitution and the independence of the judiciary more. Similarly, the Court expressed its desire to stay out of a politically controversial position in MPs Reference,[27] where the validity of membership of the opposition Parliament Members depended on the decision of the Court.

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[23] Mahmudul Islam (1995: 373).

[24] MPs Reference above note 8 at 173.

[25] 8th Amendment case above note 1 at 181.

[26] 1 BLC (1996) 483 at 498.

[27] Above note 8 at 160.

The Court is naturally eager not to be seen as taking part in politics. While dealing with these cases, judges refer to their constitutional duty to function as 'ultimate arbiter' and interpreter of the Constitution.[28] In practice, however, political activists, under the umbrella of PIL, brought a considerable number of cases where it was difficult for the Court to project its impartiality. As we have already outlined in chapter 3, political questions were rarely dealt with before the 8th Amendment case of 1988. Since then, however, the number of cases with political overtones has steadily increased as the movement for democracy coincided with the development of PIL. Political activists have often raised questions that involve constitutional interpretation but are essentially political issues on which rival forces in national politics are fighting one another.

The most interesting recent examples are the twin cases of Parliament Boycott and MPs Resignation.[29] Boycotting the parliament by the opposition MPs was a purely political decision. The judgement by Qazi Shafiuddin J in Parliament Boycott indicates the thin line dividing political and constitutional issues.[30] As interpreter of the Constitution, he declared the boycott unlawful. Standing was granted on the ground that boycotting the parliament involves public interest enabling anyone to approach the Court.

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[28] Parliament Boycott above note 9 at 48.

[29] Above note 9. For details of the facts and circumstances of these cases, see above chapters 3.7.1 and 3.8.

[30] Above note 9 at 52.

The reaction of the political parties was instantaneous and violent.[31] The judges were accused of being biased and the residence of one of the judges was even bombed. So when the same question came before the Court in another form in MPs Resignation, as mass resignation of the opposition MPs, the Court was naturally unwilling to invite further unsolicited controversy. Mahmudur Rahman J decided this time that the petitioners have no standing at all under the traditional standing rules.[32] Public interest standing was not considered since the case was held not to be a PIL.

It is interesting to note that the Court did not apply its discretion to declare that the case involved public interest. Instead, it avoided the issue on the ground that the petitioners themselves did not claim a PIL standing. However, the standing rules enunciated in the Parliament Boycott were neither contradicted nor overruled. In fact, there is little difference between boycotting the parliament and mass resignation of MPs in terms of involvement of public interest. But while such interest was sufficient for standing in Parliament Boycott, it was held not sufficient in MPs Resignation.

Apparently, under the pressure of upholding a non-controversial image in deciding an essentially political question arising out of a political problem, the Court refused to play the part of constitutional interpreter. Refusal of standing was a convenient way to avoid political controversy.[33]

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[31] See above chapter 3.7.1.

[32] For discussion on the rules of standing, see above chapter 4.4.2.2.

[33] However, this backsliding was soon halted in MPs Reference above note 8, the constitutional Reference that subsequently arose from the boycott-resignation

Another example is Md Asaduzzaman Ripon v. The State.[34] A number of government officers participated in the movement for Caretaker Government and identified themselves with the party in opposition. A writ brought by a member of the party in power pointed out that their action was clearly against their service rules.[35] But a political compromise ensued by the time the Court was ready for hearing. The Caretaker government was established and the political parties unanimously approved the appointment of one of the accused in the post of a non-party neutral Adviser/Minister. Was it then wise for the Court to assert legal technicalities and disturb the fragile equilibrium in the newly achieved democratic process? The Court did not ignore the political solution of the essentially political dispute. The judges started playing a delaying tactic. In the High Court Division, the case is still pending hearing. Even an interim order by the High Court Division was stayed by the Appellate Division.

This delaying tactic lets the Court buy some time in the hope that the problem will be automatically solved. Whether used willingly or unwittingly, it often works. First of all, the High Court Division might refuse to issue any interim order. Second, the case might be in a queue for months for a full hearing. Third, the Appellate Division might stay the judgement or order of the High Court Division and itself take a long time to decide it.

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controversy. The Appellate Division took a positive view in deciding the Reference as interpreter of the Constitution.

[34] Unreported Writ Petition 1635/1996.

[35] Government Servants (Conduct) Rules 1979 and Government Servants (Appeal and Discipline) Rules 1985.

Due to the heavy caseload of both Divisions, unless a case is given priority, which is the Court's discretion, it will take months for it to crawl through the cause-list where thousands of cases are pending hearing. Awaiting trial, the resolution of the issue in question often becomes unnecessary and the case becomes infractuous. The judges then follow the time honoured rule that the Court will not deal with a case merely for academic interest.[36]

Thus the demand that the BNP government should stop using the Media unconstitutionally for propaganda was kept pending in the Media case[37] till that party lost the parliamentary election and was no more in government. Similarly, the petition seeking leaders of the Awami League not to call strikes in Hartal[38] was kept pending by the Appellate Division till the Awami League formed the government and had no reason to call strikes.

The discussion so far illustrates a number of important points. First, the recognition and application of the doctrine of separation of powers by the Constitution of Bangladesh have given the Supreme Court a very high status. This strong position of the Court is favourable for judicial activism including the development of PIL. Second, one aspect of the high status of the judiciary is that the Court is the ultimate arbiter in constitutional issues. This has opened the gates for cases involving political questions. Third, the judges have refused to

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[36] It was said in Ghyas Siddique v. Bangladesh 43 DLR (1991) 179 that the Courts are and should be reluctant to decide constitutional points merely as matters of academic importance.

[37] Dr Mohiuddin Faruque v. Bangladesh (1995) unreported Writ Petition 466/1995.

[38] Abu Bakar Siddique v. Sheikh Hasina and others (1995) unreported Writ Petition 2057/1995.

apply the political questions doctrine and follow the principles of judicial self-restraint. They repeatedly assert that the Court deals only with the legal aspects of the disputes. The judges find it important to declare a denial of their political role in order to preserve their neutral image and credibility; thereby insulating themselves from the vulnerability of public criticism.

However, our discussion demonstrates, in relation to the development of Bangladeshi PIL, that this neutrality is more observed in theory than in practice. There is a relentless pressure from the political activists to involve the judiciary in controversial cases. The judges avoid political controversy by refusing a case on some other ground or by resorting to a delaying tactic. However, although the cases involving political issues highlight the inherently political nature of the judicial process, they do not automatically suggest that the Court is biased or subservient to some pressure group, regime or political party. Our discussion demonstrates that, despite the desire of the Bangladeshi Court to be seen as impartial interpreter of the Constitution, the influence of the continuing power struggle in national politics has often been reflected in its actions and decisions relating to PIL cases. On this premise, we now proceed to discuss the extent to which the judiciary is involved in defining and determining the jurisdiction of governmental organs, especially from the perspective of PIL.

5.2 PIL and the jurisdictional boundaries between the legislature and the judiciary

PIL has been used by political and constitutional activists to challenge the legislature in two main areas. First, in some cases, constitutional and statutory law making of the parliament has been challenged. Our discussion aims to explore to what extent these challenges have been successful and whether they involve laws relating to social and economic justice matters. Second, a number of cases dealt with the laws of parliamentary privileges. We analyse the extent to which the Court has asserted its role and curbed the powers enjoyed by the MPs that were detrimental to the interest of the public.

5.2.1 Judicial review of statutes and the Constitution

The power of the parliament to make or unmake laws, which is its primary function, is scrutinised by the Supreme Court when such action is challenged on the ground of inconsistency with the Constitution. In Bangladesh the basis of this power is found in Article 7(2) of the Constitution. While declaring that the Constitution is the supreme law of the Republic, it says that if any other law is inconsistent with the Constitution, that other law shall be void to the extent of the inconsistency. This has been re-iterated in Article 26 with regard to the provisions of Part III of the Constitution relating to the Fundamental Rights. It says:

> (1) All existing law inconsistent with the provisions of this Part shall, to the extent of such inconsistency, become void on the commencement of this Constitution.

> (2) The state shall not make any law inconsistent with any provisions of this Part, and any law so made shall, to the extent of such inconsistency, be void.
>
> (3) Nothing in this article shall apply to any amendment of this Constitution made under article 142.

These provisions expressly limit the power of the parliament to make or change laws. Even without these express provisions, in a limited government under a written Constitution, judicial review of statutes and the Constitution is implicit. As the highest Court and guardian of the Constitution, it is the duty of the Supreme Court to deal with these matters. The relevant rules and principles have developed over the years and form a significant part of the constitutional law.[39] However, we are concerned only with the impact of the PIL approach to find out the extent to which the political activists are using PIL to challenge the making or unmaking of laws by the parliament.

One type of cases questions the constitutionality of statutory laws. Public interest litigants take action when a law is violated or a legal duty remains unperformed. But there are very few examples in Bangladesh where citizen petitioners approached the Court merely to challenge a statute itself as violative of the Constitution.

In AK Mujibur Rahman v. Returning Officer and others,[40] a political activist approached the Court as a citizen and voter and challenged the amendment of certain regulation whereby the then Major General Ziaur Rahman

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[39] Mahmudul Islam (1995: 368-371) provides an outline of the principles followed by the Court in judicial review of law in its Bangladeshi context.

[40] 31 DLR (1979) 156.

was enabled to take part in the Presidential election despite being an army officer.[41] The Court rejected the petition on merits. In Mohammad Giasuddin Bhuiyan v. Bangladesh,[42] the Law Reforms Ordinance[43] was challenged. The statute came into force during a Martial Law and the petitioner questioned the validity of the subsequent ratification of the statute by the parliament. The case was refused on the ground of standing. In Sangbadpatra,[44] certain statutory provisions were challenged by newspaper owners as unconstitutional on the ground that they were detrimental to the constitutionally guaranteed Fundamental Right to freedom of press.[45] Again, as this case did not involve public interest, it was lost on the preliminary ground of standing.

Another recent example is Ziaur Rahman Khan v. Government of Bangladesh.[46] In Chittagong hill tracts, indigenous people have long been fighting for autonomy. As a result of this political unrest, elections for local councils of Rangamati, Khagrachari and Bandarban could not be held for a long time. The government repeatedly extended the statutory period within which, after the expiration of the term of the elected members, new elections were

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[41] Regulation No. 293(A) of the Bangladesh Army Regulations Volume 1 (Rules).

[42] BCR 1981 AD 80.

[43] No. XLIX of 1978.

[44] Bangladesh Sangbadpatra Parishad v. The Government of People's Republic of Bangladesh 12 BLD (AD) (1992) 153.

[45] Freedom of thought, conscience and speech are guaranteed by Article 39 of the Constitution. The Statutory provisions challenged in Sangbadpatra were sections 9, 10(3) and 11 of the Newspaper Employees (Conditions of Service) Act 1974. These sections provide for a Wage Board to be constituted by the government to fix minimum wages for newspaper employees.

[46] 49 DLR (1997) 491.

required to be held in these three councils.[47] In 1997, the government amended the law and inserted a new provision declaring that in absence of election, a government appointed council will take over for an indefinite period.[48]

The petitioners claimed that this new provision violates Article 59 and 60 of the Constitution which provide for local democracy. The Court refused to declare the new provision of section 16A anti-constitutional and decided that the appointments of the members of the local councils by the government are valid. However, the judge also declared that these selected members must arrange for an election within 60 days and can not stay in office indefinitely.[49] For the petitioners, this amounted to partial success.

It appears that in all these cases involving challenges relating to the validity of the statutory laws, the petitioners pursued their own political/special interests, not the interests of the public. No statute relating to socio-economic matters has been in question. Consequently, the petitioners' success has been limited.

As regards challenging constitutional amendments, the starting point is the 8th Amendment[50] case. This is the first case where a constitutional

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[47] The relevant statutes are Rangamati Hill Tract District Local Government Council Act (No. XIX of 1989), Khagrachari Hill Tract District Local Government Council Act (No. XX of 1989) and Bandarban Hill Tract District Local Government Council Act (No. XXI of 1989). In all these statutes, section 16 dealt with the time limit of elections.

[48] Section 16A was inserted in all the three hill tracts local council statutes by Amending Acts Nos. II, III and IV of 1997.

[49] Above note 46 at 497.

[50] Above note 1.

amendment was declared invalid by the Court. Although not a PIL, it played an important role for the development of PIL.[51] Use of public interest standing by political and constitutional activists to challenge constitutional amendments started much later. The first case where someone approached the Court as a citizen is Dr Ahmed Hussain v. Bangladesh and others.[52] In its original form, Article 65 of the Constitution reserved fifteen parliamentary seats for women for ten years. This was in addition to the women members already elected as part of the 300 member assembly. By Second Proclamation Order No. IV of 1978, the number of seats was increased to thirty and the period was extended to fifteen years from the date of the commencement of the Constitution. After the expiration of that period in 1987, the Tenth Amendment[53] rewrote Article 65(3) and the period was extended for ten more years.

The petitioner contended that the Constitution is based on democratic principles and as such indirect election is unconstitutional according to Articles 7, 8 and 11. Special treatment to women, he contended, amounts to discrimination which is prohibited under Article 28. The petitioner also relied on Article 121 which prescribes a single electoral role for parliamentary elections and prohibits classification of electors according to religion, race, caste or sex. Also relevant is Article 122(1) providing that parliamentary elections shall be on the basis of adult franchise.

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[51] See above chapter 3.3.

[52] 44 DLR (AD) (1992) 109.

[53] The Constitution (Tenth Amendment) Act (No. 38 of 1990).

These arguments were rejected since they actually go against the spirit of the Constitution. Indirect election for women MPs was provided by the Constitution from the very beginning, it is not a new invention. Article 10 states the Fundamental Principle that steps shall be taken to ensure participation of women in all spheres of national life. While Article 28 contains the Fundamental Right against discrimination, it also provides that the State is not prevented from making special provisions in favour of women, children or other backward sections of citizens. Thus, just because the election is indirect, it is not right to say that it violates constitutional provisions.[54]

The reasoning behind the adoption of indirect election is based on practical situations and necessity rather than theoretical considerations. In the traditionally male-dominated Bangladeshi society, very few women actively take part in politics. Less than two per cent of the 300 elected MPs are women. Women will remain un-represented in the parliament if a 'no special treatment' approach is observed strictly and without qualification. So the petitioner's contention was neither in favour of democracy nor beneficial to the right of women in the country.[55]

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[54] In an earlier case, Fazle (Md) Rabbi and others v. The Election Commissioner 44 DLR (1992) 14 at 16-17, the Court made an observation to the same effect. In that case, three MPs unsuccessfully challenged the election of women MPs on the ground that such indirect election can not be held unless the directly elected MPs have completed all procedural technicalities of becoming an MP including the taking of oath. But the constitutional provisions were not questioned.

[55] However, Dilara Choudhury (1995: 102) points out that when the sitting MPs elect the women members, one party gets a solid block of thirty seats for just having the majority in the parliament. So the reservation of seats for women is nothing but a weapon for the ruling party to further dominate the parliament.

Certain aspects of the Fourth and Fifth amendments[56] of the Constitution were belatedly challenged by a group of lawyers through a PIL in Syed Mahbub Ali v. Ministry of Law and others.[57] Among other things, the Fourth Amendment changed the provisions relating to appointment of judges of Supreme and sub-ordinate courts as contained in Articles 95, 98, 115 and 116; the Fifth Amendment effected Article 99 regarding the disabilities of Supreme Court judges.[58] In 1992, when a number of judges were promoted without consultation with the Supreme Court, the petitioners protested on the ground of violation of the Constitution. They further claimed that the relevant constitutional provisions, after amendments, are themselves violative of the Constitution and must be struck down.[59] We will later discuss the effect of these amendments on the balance of power between the judiciary and the executive.[60] In the present context, it is important to note that although constitutional amendments were

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Moreover, women elected in this way are put in a disadvantageous position and are mere puppets in the hands of their male colleagues and not concerned with women's issues. The validity of these arguments can not be denied. But it is unlikely that the women's situation will be improved by discarding the system altogether because the parliament will then be an all male affair. A better alternative appears to be a proportional representation of women members tied to the proportion of the MPs representing various political parties.

[56] The Constitution (Fourth Amendment) Act (No. II of 1975) and the Constitution (Fifth Amendment) Act (No. I or 1979).

[57] Unreported WP 4036/1992; later Appeal 317/93.

[58] The first Martial Law Regime amended Article 99 relating to disabilities of Supreme Court judges by Order 4 of the Second Proclamation of 1978. This was later ratified by the Constitution (Fifth Amendment) Act (No. I or 1979).

[59] The claim that constitutional amendments were *ultra vires* appears to have been made as an afterthought - one of the petitioners sworn in a supplementary affidavit.

[60] See below chapter 5.3.

challenged, the Court refused to deal with them on the ground of lack of standing. It appears that the Court was not convinced that the lawyers were pursuing a genuine people's cause. It is also possible that the long gap between the making of the amendments and the submission of the writ further weakened the case.

The Seventh Amendment[61] of the Constitution was challenged by M Saleem Ullah, a constitutional activist. He approached the Court as a citizen in M Saleem Ullah v. Justice Mohammad Abdul Quddus Chowdhury.[62] The petitioner protested against appointment of a judge as the Secretary of the Law Ministry as violative of Articles 22, 94, 99 and 147 of the Constitution relating to separation of judiciary and appointment and remuneration of judges. Although such a claim would be valid in normal circumstances, the appointment in question was made under a Martial Law Proclamation of 24 March 1982.[63] An exception in the proviso to paragraph 10(2) of the Schedule to the Proclamation provided that the Chief Martial Law Administrator was empowered to make and give prospective effect to such appointments. After the martial law was withdrawn by the Proclamation of Withdrawal of Martial Law, 10 November 1986, the question was whether the appointment in question remained protected. The Court answered in the positive because the Seventh Amendment of the Constitution, in combination with Article 150 and Paragraph 19(1) and 19(2), ratified and validated all actions of the Martial Law authority.

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[61] The Constitution (Seventh Amendment) Act (No. I of 1986).

[62] 46 DLR (1994) 691.

[63] This was later amended by the Proclamation (First Amendment) Order (No. 1 of 1982) and the Proclamation (Amendment) Order (No. 1 of 1983).

At this point, the petitioner challenged the Seventh Amendment itself on two grounds.[64] First, it was claimed that the procedures for amending the Constitution as laid down in Article 142 had not been complied with. This claim was not substantiated by any material placed before the Court. Second, the parliament's power to amend the Fourth Schedule without amending Article 150 of the Constitution was questioned.[65] This contention is not tenable for the simple reason that Article 142(1) empowers the parliament to amend any provision of the Constitution and the provisions of the Fourth Schedule, being provisions of the Constitution, are not excluded. In any case, these points appear not to have been contested with seriousness or vigour.[66]

What then is the result of the challenges, made by political activists using PIL, on the area of judicial review of statutory and constitutional law? As regards adoption and amendment of statutory laws, there has been no success. AK Mujibur Rahman[67] and Mohammad Giasuddin[68] are examples where political activists attempted to challenge the actions of the martial law authorities. Sangbadpatra[69] dealt with the interest of the rich and powerful newspaper

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[64] Above note 62 at 695.

[65] Article 150 says that the transitional and temporary provisions set out in the Fourth Schedule shall have effect notwithstanding any other provisions of the Constitution.

[66] Above note 62 at 695.

[67] Above note 40.

[68] Above note 42.

[69] Above note 44.

owners. Partial success has been attained in Ziaur Rahman Khan,[70] where the court refused to declared the law anti-constitutional but interpreted it in such a way that the government was obliged to conduct local council elections. However, this case, like the others, reflect the interest of the politicians rather than of the common people. None of these cases deal with socio-economic aspects of the law.

Constitutional amendments have been challenged in three cases. Of these, the public interest element of the first case, Dr Ahmed Hossain, is doubtful. In fact, it appears to go against the interest of women. However, this was the only case where the object of the petitioner was to directly challenge a constitutional amendment. In Syed Mahbub Ali and M Saleem Ullah v. Justice Mohammad Abdul Quddus Chowdhury, the petitioners primarily questioned the constitutionality of certain actions. Consequent challenges against constitutional amendments appear to have been taken less seriously and even as afterthoughts. In both cases, the object of the petitioners was to participate in the process of appointment of judges rather than advocating any social or economic agenda. The lack of success demonstrates that they actually failed to use the judiciary to fulfil their objectives.

It appears that, so far, political activists have not been able to use PIL to block or hinder parliamentary law making in Bangladesh. Also, the judges have not shown any willingness to transgress their limits in this respect. Abdul Bari Sarker J summarises the view of the Supreme Court:

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[70] Above note 46.

> The Court including the Supreme Court can not usurp the powers and functions of the legislature in making law or that of the administration and other authorities to make rules and regulations. In that event, a judicial despotism of the worst type follows and the Court loses both its legal and moral authority to adjudicate in such matters.[71]

5.2.2 Parliamentary privileges and internal proceedings

In a number of occasions, the political activists challenged the limits of parliamentary privileges on the ground that the MPs are abusing their power. To ensure effective discharge of the functions and responsibilities of the parliament, it must be free from any outside interference or obstruction. Parliamentary privileges are designed to ensure this freedom. In England, the relevant principles have gradually developed over the years and take up an important place in the constitutional law.[72] Recognition of the same in the Indian Constitution can be found in Articles 105 and 194, where the Constitution deals with the powers, privileges and immunities of the parliament and state legislatures and their members.[73] In the Constitution of Pakistan 1973, these principles are stated in Article 66 and 127 relating to the parliament and the Provincial Assemblies respectively.[74]

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[71] Ehsanul Hoque v. General Manager, Agrani Bank 42 DLR (1990) 60 at 65.

[72] An authoritative version of the law of parliamentary privilege in England can be found in the treatise of Erskine May, see CJ Boulton (1989: 69-160).

[73] Prititosh Roy (1991) provides a recent detailed study of the law of parliamentary privilege in India. See also HC Dholakia (1976: 472-482) for a good summary.

[74] The Constitution of 1956 secured parliamentary privileges in Articles 56 and 89; in the Constitution of 1962, the relevant Article was 111.

In Bangladesh, Article 78 of the Constitution defines the scope and limits of parliamentary privilege. The Article declares:

> (1) The validity of the proceedings in Parliament shall not be questioned in any court.
>
> (2) A member or officer of Parliament in whom powers are vested for the regulation of procedure, the conduct of business or the maintenance of order in Parliament, shall not in relation to the exercise by him of any such powers be subject to the jurisdiction of any court.
>
> (3) A member of Parliament shall not be liable to proceedings in any court in respect of anything said, or any vote given, by him in Parliament or in any committee thereof.
>
> (4) A person shall not be liable to proceedings in any court in respect of the publication by or under the authority of the Parliament of any report, paper, vote or proceeding.
>
> (5) Subject to this article, the privileges of Parliament and of its committees and members may be determined by Act of Parliament.

Clause 5 provides for an Act of Parliament declaring the details of the law. But since there is no such statute in force, it appears that the pre-Bangladeshi laws are still operative.[75]

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[75] In Pakistan, the Constituent Assembly (Proceedings and Privileges) Act 1955 provided that the members of the Constituent Assembly would enjoy the same privileges as enjoyed by the members of the British House of Commons. There was no change of situation in the Constitution of 1956 and the Constitution of 1962. This continuity of the laws of parliamentary privilege gained judicial endorsement in Badrul Huque Khan v. Election Tribunal PLD 1963 SC 704. Later came the National Assembly (Exemption from Preventive Detention and Personal Appearance) Ordinance (No. IX of 1963) granting certain immunities from preventive detention and civil court proceedings. In the then East Pakistan, it was followed by The East Pakistan Assembly Members' Privileges Act (No. IX of 1965) securing a number of privileges in more detail.

After the emergence of Bangladesh, following the principle of Badrul Huque Khan, it was declared in Suranjit Sengupta v. Election Tribunal BLD (1981) 132, that all pre-Bangladeshi laws relating to parliamentary privileges will be applicable to the Bangladeshi parliament. Mahmudul Islam (1995: 347-350) severely criticised this decision on the ground that the emergence of Bangladesh created a new legal regime where the old law relating to privileges

An advocate came as a citizen to file a contempt case in Cyril Sikdar v. Nazmul Huda.[76] The facts of the case are that a debate took place in the parliament as to whether or not the First Information Report in a criminal case incriminated a member of parliament. Mr Nazmul Huda, a minister, took part in the discussion and said that the order granting the bail had been concocted and the judge was open to bribes. Contempt of Court was alleged as the matter was *sub-judice* before the criminal court. It was claimed that Mr Huda's statements vilified and scandalised the judges, shook public confidence in the administration of justice and was actuated by malice and ill-will. The question was whether Article 78(3) protected Mr Huda.

To start with, Rahman J considered the facts and found that the Speaker had expunged the relevant portions of the parliamentary proceedings on the ground that the matter was *sub-judice*. So the petitioner relied on newspaper reports only and could not provide clear evidence of any derogatory remark. Even if the remarks alleged had been made, the Court observed, there was hardly anything contemptuous of any court or judge.[77]

As regards the constitutional provisions, the Court found that clauses 3 and 4 of Article 78 are relevant as they ensure freedom of speech in the

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can not apply. It is argued that the Constitution and the parliament of Bangladesh are dissimilar to those of Pakistan, and as Bangladesh is not a successor State, its parliament cannot be called a successor to the legislature of Pakistan. It must be noted here that although the Assembly Member's Privileges Ordinance (No. III of 1980) sought to repeal the Ordinances of 1963 and 1965, it was not ratified by the parliament and lapsed.

[76] 46 DLR (1994) 555.

[77] *Ibid.* 557-558.

parliament. It was observed that in the Indian Constitution, the same principles are stated in Article 105(2). Also, Articles 121 and 211 provide that there can be no discussion in the parliament regarding the conduct of a judge in relation to the discharge of his duties. The combined effect of these rules is that the Speaker of the Indian parliament will not allow any such discussions, but if something is said inadvertently or otherwise, no action lies in a court of law.[78] In Bangladesh, there is no express provision comparable to Articles 121 and 211. But Rahman J declared that the law is the same as in India and as such Mr Huda was protected under Article 78(3).[79]

Another attempt by a political activist to question parliamentary privilege was made in the Parliament Boycott case.[80] The question was whether boycotts, walk-outs and similar other measures are all parliamentary and democratic activities and are protected as parliamentary privilege under Article 78 of the Constitution. The Court made several observations.[81] First, the English or Indian cases do not offer a precise definition of 'internal proceedings'; these proceedings do not extend to each and every thing that has been done or committed within the four walls of the parliament. Second, privileges under Article 78 do not allow the destruction or obstruction of fundamental constitutional processes including the obligation to participate in parliamentary proceedings. Third, in cases where the provisions of the Constitution are violated, the Court is bound to exercise its

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[78] Special Reference case No. 1 of 1964 AIR 1965 SC 745.

[79] Above note 76 at 560-561.

[80] Above note 9.

[81] *Ibid.* at 47-48.

jurisdiction unless there is a clear constitutional bar. Thus it was declared that abstention from parliamentary session without leave of the parliament cannot be a privilege. Qazi Shafiuddin Ahmed J said:

> While it can fairly be conceded that internal proceeding of the House relating to its proper business is immune from challenge in Court, it cannot be conceded that indulging in strike, hartal and street propaganda for realisation of the demand for a caretaker government shunning the constitutional obligation in participating in parliamentary proceedings and destroying the fundamentals of the Parliament, in other words, affecting the constitution of the House can by any stretch of imagination be called internal proceeding to be barred under Article 78 of the Constitution. This abstention for realisation of the demand is a matter which pertains neither to the regulation of the procedure of the House nor the conduct of its business or the maintenance of order in the National Assembly or affecting any of its privileges.[82]

In the MPs Resignation case,[83] another PIL case brought by political activists, parliamentary privilege was dealt with in more detail. The question was whether the *en mass* submission of the resignation letters by the opposition MPs is a matter of internal proceedings of the parliament and protected under Article 78. Both Mahmudur Rahman J and Kazi Ebadul Haque J extensively dealt with English, Indian and Pakistani laws.[84] It was observed that the terms 'proceedings-in-parliament' and 'parliamentary privilege' are hard to define.[85] Mahmudur Rahman J held that Article 78 applies only with respect to internal proceedings.[86] Even if it relates to parliamentary business, submission of resignation letters do not form a part of internal proceedings until the Speaker brings the fact to the

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[82] *Ibid.* at 47.

[83] Above note 9.

[84] *Ibid.* at 374-378 and 395-397.

[85] *Ibid.* at 376-377.

[86] *Ibid.* at 377-378.

notice of the House in session. Accordingly, the Court's jurisdiction was declared not barred. Kazi Ebadul Haque J agreed with these observations.[87]

Although not a PIL, MPs reference[88] requires to be mentioned briefly as it followed the twin cases of Parliament Boycott and MPs Resignation. It was argued that the absence of the MPs from the parliamentary sessions is a matter relating to the parliament only - it can not be decided in a Reference because the issue is not amenable to writ jurisdiction. ATM Afzal CJ denied that the absence of the MPs constitutes formal transaction of business of the parliament or its internal proceedings.[89] Mustafa Kamal J agreed and found that the Court is free to deal with constitutional interpretation involving the composition and constitution of parliament which is not an internal proceeding.[90]

It appears from the discussion that the political and constitutional activists repeatedly challenged the limits of parliamentary privileges and the legislature was urged not to use them to step out of its domain. The Court, in its part, acted wisely and showed restraint and courage at the same time. It granted privilege in Cyril Sikdar but refused protection in Parliament Boycott and MPs Resignation and made Parliament conform to its constitutional limitations. The judicial view as to parliamentary privileges culminated in MPs Reference. The position taken by the Court in this case suggests at least two broad principles enhancing the Court's authority.

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[87] *Ibid.* at 397.

[88] Above note 8.

[89] *Ibid.* at 173-174.

[90] *Ibid.* at 197.

The first principle states that since there is no definite categorisation, the Court, as the interpreter of the Constitution, has the ultimate authority to decide what are or are not parliamentary privileges. Mustafa Kamal J said:

> In respect of Parliament, I know of no other principle of judicial self-restraint than the one that the Court will not interfere with the "internal proceedings" of Parliament. What is an "internal proceedings" of Parliament is also for this Court to decide, if it requires a decision, and it is well-settled that these words cannot be fitted into a straight jacket of complete categorisation.[91]

The second principle asserts that judicial scrutiny is not barred when the Constitution is violated and parliamentary privilege is sought to be used as a protection. Latifur Rahman J says:

> The internal and proper businesses of the proceeding of the Parliament is beyond the purview of the constitutional Court, but while acting in the name of internal proceeding, if any violation of constitutional provision takes place then this Court is certainly competent to interfere.[92]

As regards the law relating to parliamentary privilege, the influence of the PIL challenges by the constitutional and political activists appear to have achieved some positive results. The Court has been activated to assert its role and has proven its stance as a guardian of the Constitution. But these cases represent concerns of the élite and the successes achieved have little to do with the welfare of the people.

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[91] *Id.*

[92] *Ibid.* at 203.

5.3 PIL and the jurisdictional boundaries between the executive and the judiciary

Development of PIL in Bangladesh has been closely connected with several issues relating to the jurisdictional boundaries between the executive and the judiciary. Political and constitutional activists have often attempted to re-define these boundaries through PIL cases. We aim to analyse the results of these attempts.

Our discussion proceeds in three stages. Chapter 5.3.1 discusses the definition of the term 'state'. The aim is to explore to what extent the judiciary has extended this definition so that it can exert more control, through writs, over social and economic functions of the government. Chapter 5.3.2 examines the attempts by constitutional and political activists to curtail the executive power of the appointment, tenure and retirement of judges. Chapter 5.3.3 discusses certain aspects of implementation of PIL judgements in Bangladesh to explore the extent to which the judiciary is encroaching upon the province of the executive.

5.3.1 Definition of the 'State' and other relevant terms

In theory, private interests are sufficiently protected by the ordinary law of the land. So the primary concern of the special provisions of constitutional writs is to protect the individual from the might of the State. But the situation differs depending on whether a constitutional or legal right is in question. As regards the constitutional Fundamental Rights, writ may issue under Article 102(1) against any person or authority including any person performing any function in

connection with the affairs of the Republic. But in cases involving legal rights under Article 102(2), except *habeas corpus*, a writ lies only against any person performing any function in connection with the affairs of the Republic or of a local authority or a person holding or purporting to hold a public office.[93]

This means that the enforcement through writs of some of the Fundamental Rights and almost all of the legal rights depend on the scope and limit of the terms 'Republic', 'local authority' and 'public office'. The more these definitions are extended, the more areas become amenable under the writ jurisdiction.

The result is that the judiciary is able to monitor a wider area if the definition of the term 'state' is wider. This is especially important in the light of the ever-widening sphere of state activities touching social and economic issues relating to the common people. This includes governmental participation in various types of financial and commercial activities where certain company or corporation is declared by the government to be outside the public domain. The executive has an inherent tendency in these matters to avoid judicial scrutiny. Expansion of the definition of state can ensure that the judiciary monitors these cases as public law issues, whether or not the petitioner approach the court with a special grievance of his own.

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[93] It was held in Manjurul Huq v. Bangladesh and others 44 DLR (1992) 239 that a writ petition for orders directing persons performing any functions other than those of the Republic or of a local authority is not maintainable.

The term 'Republic' in Article 102 means the People's Republic of Bangladesh - generally referred in the Constitution as the 'State'. The term is used to differentiate between public and private authorities. Article 152(1) says:

> "the State" includes Parliament, the Government and statutory public authorities.

In the Indian Constitution, 'State' has been defined in Article 12 at the beginning of Part III relating to the Fundamental Rights. The definition of 'state' includes central and provincial governments and legislatures and all local and other authorities within the territory of India or under the control of the Indian government. Article 36 follows this definition for the purpose of Part IV relating to the Directive Principles of State Policy. The Bangladeshi definition of the State not only reflects the unitary character of the Republic, it has also opted for the simple term of 'statutory public authorities' instead of a longer description.

5.3.1.1 Components of the 'State'

One component of the State here is the parliament. The only relevant case is Parliament Boycott,[94] where it was argued that the MPs are not persons performing functions in connection with the affairs of the Republic and as such no writ lies against them. The Court denied this argument and said:

> The word 'any person' appearing in Article 102 of the Constitution also includes a member of the Parliament as legislature is one of the component and main organs of the Republic, and Executive, Legislature and Judiciary, these 3 organs taken together constitute the Republic of Bangladesh, as such, respondent Nos. 3-5 are persons

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[94] Above note 9.

> within the meaning of Article 102 of the Constitution and they are performing their functions in connection with the affairs of the Republic . . .[95]

Another component of the State is the government. This primarily means the executive department.[96] Since the parliament has been mentioned and the judiciary has not, the question arises whether the judiciary is impliedly included in the definition of the State. A positive answer was given in Shamsul Huq Chowdhury v. Justice Md Abdur Rouf.[97] One of the reasons advocated was that the State is defined using the word 'includes' instead of the word 'means'. This indicates that the definition is not exhaustive.[98] But the main argument was that the meaning of the term 'government' depends upon the constitutional set up of a particular state and the laws and rules framed thereunder. Since the overall scheme of the Bangladesh Constitution is to provide a democratic tripartite

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[95] *Ibid.* at 46-47.

[96] The meaning of the term 'government' was discussed in Government of the People's Republic of Bangladesh v. Md Habibur Rahman 31 DLR (AD) (1979) 152. The definition given in this case was not with respect to the Constitution but related to certain statutory law. It was said that the enactment in question used the term to mean a body of persons governing the State. The word was thus used in a real and concrete sense in identification of a distinct authority to discharge certain statutory functions. It was also observed that the true construction of the word depends upon the constitutional set up of the country.

[97] 49 DLR (1997) 176 at 182-185. In India, the same view was taken by the Court in Sheikriyammada Nalla Koya v. Administrator, Union Territory of Laccadives AIR 1967 Ker 259 at 266. In that case, it was thought reasonable to presume that the Constitution makers intended to include the judicial organ in the concept of the State even though it was not expressly mentioned in Article 12.

[98] In Bangladesh, the different effect of the use of the terms 'includes' and 'means' has been discussed in Dira Dockyard and Engineers Ltd. and others v. Bangladesh Shilpa Rin Sangstha and others 39 DLR (AD) (1987) 59 at 65, where the Court said that the use of the word 'includes' does not exclude other possible meanings besides what have been expressly mentioned.

system of government, " . . . it can not be said that the judiciary is not intended to be an independent organ of the state".[99]

Although the judiciary is recognised as an independent organ, the judges of the constitutional court, i.e. the Supreme Court, do not fall in the category of agents and servants of the State to whom writs may issue. This aspect will be further discussed in sub-chapter 5.3.2.3. But the law is different as to the judges and magistrates of lower courts and tribunals. Writs may be issued against them under Article 102(5) subject to two exceptions. First, courts or tribunals established under laws relating to the defence services of Bangladesh or any disciplined force.[100] Second, a tribunal to which Article 117 applies. This article applies to administrative tribunals which are mainly concerned with service of government officers and government property.[101]

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[99] Shamsul Huq Chowdhury above note 97 at 183.

[100] The law on this point developed mainly after the lifting of the first Martial Law in the early 1980s. Initially, the Court took a narrow view in Bangladesh v. Md Abdur Rab 33 DLR (AD) (1981) 143 and held that even a Screening Board is a 'court or tribunal'. But later, a wider interpretation in Bangladesh v. AKM Zahangir 34 DLR (AD) (1982) 173 held that a body must perform some quasi-judicial function to be a tribunal. Thus, it was held in Major Hafizur Rahman v. Bangladesh 29 DLR (1977) 34 and Fazlur Rahman v. Secretary of Home Affairs 41 DLR (HCD) (1989) 459 that writ lies against orders by individual officers not enjoying any quasi-judicial authority. Further progress was made in Jamil Huq v. Bangladesh 34 DLR (AD) (1982) 125. Relying on Khandker Ehtashamuddin v. State 33 DLR (AD) (1981) 154 it was stated that a writ lies if the action taken is *mala fide* or *corum non judice*. Jamil Huq also declared that the decision of the Court will depend on the character of the authority exercising power, the purpose for which the power is exercised and the intention of the legislature to grant immunity to that authority from judicial review. Apparently, the Supreme Court has gradually extended its authority to a considerable extent.

[101] The status of administrative tribunals created under Article 117 was analytically discussed in Mujibur Rahman v. Bangladesh 44 DLR (AD) (1992) 111. MH Rahman CJ (*Ibid.* at 120) observed that an administrative tribunal may act

Two more terms associated with the definition of the State are 'public office' and 'persons in the service of the Republic'. Public office is a right, authority and duty, for a specific term and tenure, to exercise some portion of the sovereign power of the government for the benefit of the public.[102] It is created by the Constitution, statute or statutory power. Under Article 102(2)(b)(ii), a writ may issue requiring a person holding or purporting to hold a public office to show under what authority he claims to hold that office. A wider definition enables the citizens to challenge unlawful usurpation of public office.

A public office is occupied by a public officer. Article 152(1) says that a public officer is a person holding or acting in any office of emolument in the 'service of the Republic'. The same Article defines:

> "the service of the Republic" means any service, post or office whether in a civil or military capacity, in respect of the Government of Bangladesh, and any other service declared by law to be a service of the Republic.

There are a number of factors that determine whether a person is in the service of the Republic. These have been authoritatively declared in Justice Shahabuddin.[103] The summary of the observations is that these persons:

> i) render their services to the State and not to any other person or institution;
>
> ii) hold posts in the permanent structure of the administration;
>
> iii) are controlled by different Ministries;

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judicially, but still remains an administrative tribunal as distinguished from a court.

[102] See Mahmudul Islam (1995: 464-465) for further elaboration in the Bangladeshi context.

[103] Abu Bakar v. Justice Shahabuddin Ahmed above note 26 at 497.

iv) have their remuneration, salaries, retirement and other benefit drawn directly from the public exchequer;

v) are subject to statutory laws and regulations determining their appointment, terms of employment and retirement; and

vi) are constitutionally protected from arbitrary removal, dismissal etc. under Article 135, backed by provisions of Administrative Tribunals under Article 117.[104] The presence of this alternative remedy means that no writ lies in these cases unless a Fundamental Right is concerned which can attract Articles 44 and 102.[105]

The list of persons in the service of the Republic consists of secretaries, gazetted and non-gazetted officers and employees of the government serving in the Secretariat, various departments, sections, directorates and other branches of different Ministries. Also included are officers and staff of all other government offices including the offices of constitutional post holders. Although the phrase 'public servants' includes all employees of governmental, corporate and statutory bodies, not all of these persons are in the service of the Republic.[106]

There are two major exceptions. The first exception involves constitutional post-holders. A considerable number of PIL cases involved this issue, it will be analysed in detaile in chapter 5.3.2.3 below. The second

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[104] The protection under Article 135 relating to dismissal is not applicatble to persons holding military posts. See Major Hafizur Rahman v. Bangladesh 29 DLR (1977) 34 and Abdul Latif v. Bangladesh 43 DLR (1991) 446.

[105] The significant exception regarding Fundamental Rights was pointed out in Shafiuddin Ahmed v. Bangladesh 47 DLR (1995) 81 at 133. The Court relied on the peculiar features of the Bangladesh Constitution and held that the guarantee provided by Article 44 ensures the enforcement of the Fundamental Rights through Article 102.

[106] This definition of 'public servants' is given in Section 2(d) of the Public Servants Retirement Act (No. XII of 1974). In the Indian Constitution, Article 16 is not confined to 'persons in the service of the Republic' and is applicable to all public employments.

exception relates to the employees and officers of statutory public corporations and bodies. They are not 'persons in the service of the Republic', even though 'statutory public authority' is included in the definition of the State.[107] The result is that they are vulnerable to governmental arbitrary decisions and can not resort to the protection of Article 135.[108] However, for the purpose of public interest cases, the situation has little relevance.

Finally, most important in relation to the social and economic functions of the state, are the scope of the terms 'statutory public authority' and 'local authority'.

5.3.1.2 'Statutory public authority' and 'local authority'

The counterpart of the term 'statutory public authority' in Article 12 of the Indian Constitution is "local and other authorities within the territory of India or under the control of the Government of India". Initially, the Indian Court took a restrictive position and applied the principle of *ejusdem generis* in determining 'other authorities'. Thus only authorities exercising government or sovereign

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[107] The basic argument is that the statutory corporations approximate business management and are not involved with the governance of the State. See Bangladesh Small Industries Corporation v. Mahbub Hossain v. Mahbub Hossain 29 DLR (1977) 41 at 48 and Bangladesh Bank v. Mohammad Abdul Mannan 46 DLR (AD) (1994) 1 at 9.

[108] The leading case on this issue is Bangladesh Small Industries Corporation above note 107. It was declared that these officers are protected by relevant statutory provisions and their service contracts. However, the employer, i.e. the government, is in a dominant position and there is scope for injustice. The result has been a greater emphasis by the Court on the principles of natural justice. See Managing Director, Janata Bank v. Hafijuddin Ahmed and others 29 DLR (SC) (1977) 39 and AZ Rafique Ahmed v. Bangladesh Council of Scientific and Industrial Research 32 DLR (AD) (1980) 83.

functions were included.[109] But this principle was questioned in Ujjam Bai[110] where the Court pointed out that the *ejusdem generis* rule can not be applied because in Article 12, there is no common genus or category running through the named bodies.

This resulted in the expansion of the definition in Electricity Board, Rajasthan v. Mohan Lal[111] where it was held that other authorities include all authorities created by the Constitution or statute and on whom powers are conferred by law.[112] Finally, in RD Shetty v. International Airport Authority,[113] the definition was further enlarged by declaring that 'other authorities' includes any body which is an 'agency or instrumentality of the State'.[114] Especially, the explanation by Mathew J is very wide and aims to prevent a large-scale evasion of the Fundamental Rights by the government through transferring work done in governmental departments to statutory corporations, while retaining governmental control. Thus the Indian situation shows a continuous progress

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[109] University of Madras v. Shant Bai AIR 1954 Mad 67; BW Devadas v. Karanataka Engineering College AIR 1964 Mys 6.

[110] Ujjam Bai v. State of Uttar Pradesh AIR 1962 SC 1621.

[111] AIR 1967 SC 1857.

[112] This was followed in Sukhdev Singh v. Bhagatram AIR 1975 SC 1331 where the Court stressed on the legislative intention of creating the authority instead of the mode of creation.

[113] AIR 1979 SC 1628.

[114] This was followed in numerous cases including the leading case of Ajay Hasia v. Khalid Mujib AIR 1981 SC 487 and AL Karla v. Project and Equipment Corporation of India Ltd. AIR 1984 SC 1361.

towards a liberal interpretation.[115] Also, these developments went on hand in hand with PIL developments.

In Bangladesh, the term 'statutory public authority' has been defined in Article 152(1) of the Constitution:

> "Statutory public authority" means any authority, corporation or body the activities or the principal activities of which are authorised by any Act, ordinance, order or instrument having the force of law in Bangladesh.

Apparently, the framers of the Constitution of 1972 adopted a principle almost similar to that established in India in 1967 by the Electricity Board, Rajasthan. To be a component of the State, an authority does not need to have any particular mode of creation or method of operation and even the legislative intention is irrelevant. Apparently, the main test is that its activities or principal activities are authorised by some document, statutory or not, having the force of law. This very liberal approach is further expanded by the definition of law provided in Article 152(1):

> "law" means any Act, ordinance, order, rule, regulation, bye-law, notification or other legal instrument, and any custom or usage, having the force of law in Bangladesh.

The PIL petitioners in Bangladesh Retired Government Employees Welfare Association v. Bangladesh[116] relied on these liberal provisions. The question was whether an association can act as a legal person capable of filing a writ petition under Article 102. Naimuddin Ahmed J observed that the

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[115] A complete review of the law and the present position can be found in Central Inland Water Transport Corporation Ltd. v. Brojo Nath AIR 1986 SC 1571.

[116] 46 DLR (1994) 426 at 434.

association in question is registered under an Ordinance.[117] Apparently, its activities are authorised by that Ordinance and as such, the association can be deemed to be a body within the meaning of the definition of statutory public authority. Since Article 102(5) states that, for the purpose of Article 102, a person includes a statutory public authority, the association in question is a person by operation of law. Consequently, it is allowed to ask for remedies in writs.

As regards the term 'local authority', the Indian position can be found in the definition given in Section 3(28) of the General Clauses Act[118] and a number of relevant cases.[119] The same statute applies in Bangladesh.[120] But at the same time when the term statutory public authority was introduced, the lawmakers extended the definition. In Bangladesh, Section 3(28) says:

> "local authority" shall mean and include a Paura Shava, Zilla Board, Union Panchayet, Board of Trustees of a port or other authority legally entitled to or entrusted by the Government with the control or management of a municipal or local fund, or any corporation or other body or authority constituted or established by the Government under any law.

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[117] The Voluntary Social Welfare Agencies (Registration and Control) Ordinance (No. XLVI of 1961).

[118] No. X of 1897.

[119] The leading case is Rashid Ahmed v. MB Kairana AIR 1950 SC 163. See also State of Gujarat v. Shantilal Mangaldas and others (1969) 1 SCC 509 and Masthan Sahib v. The Chief Commissioner, Pondicherry and another AIR 1963 SC 533.

[120] Under Article 152(2) of the Bangladesh Constitution, the General Clauses Act (No. X of 1897) applies in relation to the Constitution and the statutues. So the definitions and rules of construction laid down in the Act are to be used in constitutional as well as statutory interpretations.

The amendment made by the Presidential Order 147 of 1972 included the words "or any corporation or other body or authority constituted or established by the Government under any law" - these words can not be found in the Indian version of the statute.[121]

The most noticeable effect of this change is that some of the bodies that fall in the category of other authorities in India are included in the list of local authorities in Bangladesh. In Bangladeshi law, local and statutory public authorities are very closely linked concepts. They cover a huge area, especially when considered with the wide definition of the term 'law'. It appears that the lawmakers attempted to establish a very liberal definition of the State. So the absence of the term 'other authorities' in the Bangladeshi definition of the State does not necessarily restrict the Court's scope of creative interpretations. Yet, it must be admitted that the extensive efforts by the lawmakers give the judges less reason to make or propagate new concepts. The liberal Indian doctrine of instrumentality of the State has been discussed by the Appellate Division, but was not followed on the ground that the Bangladeshi constitutional and legal provisions are different.[122]

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[121] Constitutionally speaking, local authority is distinct from local government. While the former is a purely administrative unit consisting of officers appointed after a selection process, the latter is composed of the representatives of the people democratically elected. In Bangladesh, the Fundamental Principle of local government is laid down in Article 9 and their mode of election, functions and powers have been provided for in Articles 59 and 60.

[122] See for example the discussion by Shahabuddin Ahmed CJ in Bangladesh Bank v. Mohammad Abdul Mannan above note 107 at 6-7.

The law applied in Bangladesh to determine whether or not a body is a local authority thus follows its own route of development. Apart from the bodies that are already mentioned in the General Clauses Act, Paura Shava, Zilla Board etc., the primary rule is that a body is a local authority if it is constituted by a statute. Accordingly, it was declared in Abdul Haque Sikder v. Divisional Manager (Fertilizer) BADC[123] that a statutory corporation is a local authority. This was extended in Conforce Limited v. Titas Gas Company Limited[124] where the Court held that a writ lies not only against a statutory corporation, but also against a company which is a subsidiary of a statutory corporation performing functions assigned by law to that corporation.

Further liberalisation was made in AZ Rafique Ahmed v. Bangladesh Council of Scientific and Industrial Research,[125] where a body was created by a resolution of a Ministry. Initially, it was held not a local authority by the High Court Division. The argument was that a resolution is not a law because it is not made in exercise of any law making power of the President. But the Appellate Division liberally held that the resolution was covered by the expression 'other legal instrument' used in the definition of law in Article 152(1). Being thus created by law, the authority in question was a local authority.[126]

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[123] 48 DLR (1996) 574.

[124] 42 DLR (1990) 33.

[125] Above note 108. This was an appeal from AZ Rafique Ahmed v. Bangladesh Council of Scientific and Industrial Research 31 DLR (1979) 222.

[126] It appeas that only a governmental order made pursuant to a Statute has the force of law. In the present case, the Appellate Division based its decision on the ground that the resolution was subsequently followed by a Statute establishing the Council and revoking the resolution. Mahmudul Islam (1995: 387,

The wider definition accepted by the Appellate Division is more in harmony with the constitutional approach. It operates within two limitations. First, a body must be created by law to be a local authority. Societies[127] and associations[128] are thus excluded. Bodies created by executive instructions fall in the same category.[129] Second, the Court is very quick to distinguish the commercial activities of the government as distinct from its sovereign or executive functions. It has been said that a local authority implies a public duty authorised by law to carry on some administrative activities and the body is entrusted with some portion of the sovereign functions of the State.[130] Thus pure commercial business ventures of the government, even if the government is the sole owner, are not local authorities.[131]

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footnote 2) takes a rather narrower view and criticises the decision on the ground that the resolution, when passed, was an administrative act and was not in exercise of any power under any statute.

[127] It was held in Jiban Kumar Barman v. M Abdul Hye 48 DLR (1996) 569 that a co-operative society is not to be considered as created by law merely because it is registered as a body-corporate under the Co-operative Societies Ordinance 1984.

[128] The Bangladesh Diabetic Association was held not a local authority in Manjurul Huq v. Banglandesh and others above note 93. Bangladesh Football Federation had the same position in Shahabuddin v. Secretary, Ministry of Youth and Sports 45 DLR (1993) 360.

[129] In Keramat Ali Talukdar v. Election Tribunal 31 DLR (1979) 1, the vested and non-resident property cell, created by an instruction of Additional Divisional Commissioner, was held not a local authority.

[130] Bangladesh Small Industries Corporation above note 107.

[131] Lutful Kabir v. Secretary, Agaz Rubber Industries 29 DLR (1977) 45. Bangladesh Consumer's Supplies Company Ltd. v. Registrar, Joint Stock Companies 46 DLR (1994) 552.

Our discussion so far demonstrates that the constitutional and legal provisions involving the definition of the State are wide and liberal in Bangladesh. After the independence, the lawmakers incorporated various progressive elements from the sub-continental jurisdictions. Thus the wider term 'statutory public authority' has been used in the Constitution and section 3(28) of the General Clauses Act has been amended to widen the meaning of 'local authority'. In India, however, the law has been further liberalised in the late 1970s by adopting the doctrine of the instrumentality of the state. This development more or less coincided with the introduction of PIL. In Bangladesh, the courts have gradually advanced towards recognising a more liberal stance. But still, in comparison with India, the definitions are narrower in scope. The doctrine of instrumentality of the state has not been followed and the scope of the term local authority remains somewhat restricted.

The use of the words 'statutory public authority' is a new technique and not a carbon copy of the Indian words 'local and other authorities'. Yet, the basic assumptions of the definitions in both the countries are the same and thus the difference is one of scope rather than content. There is still room for the Bangladeshi judges to consider these terms more liberally. Functions involving important social and economic interests of the people are often performed by societies, associations or bodies created by executive instructions. Sometimes corporations and companies created by the government, although operating as commercial ventures, affect the welfare of the entire populace, especially because of the monopoly granted by the state. A wider definition of 'state' will enable the

judges to monitor the activities of these organisations when socio-economic issues are concerned. This will prevent the government to avoid judicial scrutiny by creating bodies and corporations and placing them outside the public domain even when their functions involve welfare of the people.

5.3.2 Impact of PIL on judicial independence: Problems of appointment, tenure and retirement of judges

The power of the executive to appoint and discipline judges, including their post-retirement re-appointment in various other offices, has been a major issue of controversy in Bangladesh in recent years. This power has been abused not only by the autocratic regimes, but even after the restoration of democracy in 1991, successive democratic governments continue to use it to influence the judiciary.[132] The party in power use the opportunity to make controversial appointments to serve its interests. Several attempts in the parliament by the opposition to restrict this power have failed as the proposals were not supported by the government.[133]

As a result, political activists used PIL to challenge such appointments whenever they disagreed with the government's decision, indirectly raising political issues in the judicial arena. Thus appointments of the President, the

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[132] For example, see MI Farooqui's (1996b: 65-68) discussion relating to the 1991-1995 government of the Bangladesh Nationalist Party. He analyses several instances to illustrate that, not unlike the previous autocratic regime of General Ershad, the democratic government continued to harass the judiciary

[133] In 1991, opposition MP Mr Salahuddin Yusuf introduced a constitutional bill proposing more power for the Supreme Court, as opposed to the executive, to appoint and discipline judges. But as the government did not agree, the bill ultimately expired. See MI Farooqui (1996b: 66) for further discussion.

Vice-President, Election Commissioner etc. has been debated in the Court on the ground of public interest. In all these cases, the core of the argument is that the executive has disproportionate power to appoint and discipline judges and has been using this power to curb judicial independence. It goes against the obligation of the State under Article 22 to ensure separation of the judiciary from the executive.

An interesting case is Dr Mohiuddin Farooque v. Bangladesh, represented by the Secretary, Ministry of Law, Justice and Parliamentary Affairs.[134] The petitioner claimed that the failure to appoint judges in the vacant posts in the Supreme Court is in violation of the constitutional obligation of the appointing authority, the executive. At that time, thirteen out of the forty posts of the Supreme Court judges were vacant. The case was dismissed on the preliminary ground of standing. The attempt appears to be a bit sensational and the petitioner was perhaps concerned less about winning the case and more about publicising the importance of the issue.

The following discussion focuses on two major problems. The first problem arise when the executive ignore to consult the judiciary with respect to appointment, promotion and discipline of judges. The second problem relates to the appointment of ex-judges in various constitutional posts. Our aim is to analyse to what extent the political and constitutional activists have succeeded in challenging the arbitrary decisions of the government and whether PIL has brought any significant change in this area benefiting the people.

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[134] 48 DLR (1996) 433.

5.3.2.1 Consultation relating to the judges of the Supreme Court

The practice of consultation with the Supreme Court regarding appointment, promotion, discharge etc. of the judges has been followed since the British period even when there was no specific legal or constitutional requirement. It is regarded as a convention and a part of the constitutional law.[135] Furthermore, in the Constitution of India, consultation is an obligatory feature.[136] But in any case, consultation is not a mere formality but must be effective and the opinion of the Court must be given full weight. It must be consensus-oriented, ensuring effective exchange of view in case of difference of opinion. [137] Although earlier Indian cases held that consultation does not mean concurrence, recent law is that the recommendation of the Chief Justice should have primacy over the opinions of other functionaries and must not be by-passed unless there is an exceptional circumstance.[138] In Bangladesh, public interest standing has been repeatedly used by the constitutional activists to question the executive attitude that undermines the importance of consultation. The situation is discussed below in two stages involving the Supreme Court and the lower judiciary.

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[135] Mahmudul Islam (1995: 363).

[136] See Articles 217 and 233 of the Indian Constitution.

[137] For Indian cases, see Hari Datt v. State of HP AIR 1980 SC 1426; SP Gupta v. Union of India AIR 1982 SC 149; Chandramouleswar v. Patna High Court AIR 1970 SC 370.

[138] An authoritative exposition of the earlier law was given in SP Gupta v. Union of India above note 137. This was later overruled by Supreme Court Advocates-on-Record v. India AIR 1994 SC 268.

As regards the Supreme Court, the Chief Justice and other judges of both the divisions are appointed by the President under Article 95(1). Except while appointing the Chief Justice, under Article 48(3), the President acts in accordance with the advice of the Prime Minister. As regards the role of the judiciary in such appointments, the original Article 95(1) provided that the President will appoint the other judges "after consultation with the Chief Justice". But this requirement of consultation was omitted by the Fourth Amendment of the Constitution.[139] At the same time a similar requirement for consultation regarding Additional Judges of the Supreme Court was omitted from Article 98.

In the absence of constitutional provisions, the question is whether consultation is still an absolute requirement. This depends on the status of the constitutional practice of consultation and the extent to which the practice is accepted as a convention. There are two arguments in favour of an established convention. First, the historical background and the practice of consultation as obligatory in India. Second, the fact that the government continued the practice in spite of suspension of democracy after the Fourth Amendment. Thus Hamiduddin Khan observed in 1989:

> Apparently, there is a deviation, but as briefly mentioned, the consultative practice followed earlier is conventionally followed, and if convention is entrenched firmly, it will furnish more effective safeguard than a mere written precept.[140]

In practice, however, the convention was not entrenched firmly. In 1994, the practice was ignored for the first time in the middle of the process of

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[139] The Constitution (Fourth Amendment) Act (No. II of 1975).

[140] Hamiduddin Khan (1989: 32).

restoration of democracy. The government appointed nine judges of the Supreme Court without prior information or consultation with the Chief Justice. This was seen as a serious attack on the authority of the judiciary and the Chief Justice objected to this decision. He even publicly declared that he is considered as a 'Mr. Nobody'.[141] The Bar Associations vehemently protested the appointment and started to pressurise the government.[142] The government ultimately came to a compromise and changed the names of a number of judges from the list of appointment.[143]

In spite of this success, the government has, in a subsequent instance, again refused the necessity of consultation while a judge was re-appointed in the Appellate Division. This was challenged by an advocate in Shamsul Huq Chowdhury v. Justice Md Abdur Rouf and others.[144] The case was decided on other grounds and the Court did not comment on the matter. But the government argued vehemently that the practice has not yet 'ripened' enough to be a convention. This points out, on the one hand, that the judiciary is still in danger

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[141] The Chief Justice was inaugurating The Lawyers Conference of the Bangladesh Bar Council on 4/2/94.

[142] Abdur Rashid (1994: 14-16) provides a full description of the crisis. He points out that the reaction of the bar was inevitable, especially because of the questionable competence of the persons in the list.

[143] The Bar was not entirely happy with the compromise. On a meeting on 10/2/94, it was declared that effective and meaningful consultation had not taken place. Consequently, the Bar decided not to accord any felicitation to any of the newly appointed judges.

[144] 49 DLR (1997) 176 at 186.

of being outweighed by the executive.[145] But on the other hand, any such appointment is likely to be challenged by the constitutional activists through PIL as violative of conventional constitutional practice.

5.3.2.2 Consultation relating to lower court judges

As regards the appointment of sub-ordinate judges, the constitutional provisions are to be found in Articles 114 to 116A. Originally, Article 115 provided that the district judges would be appointed by the President on the recommendation of the Supreme Court and all other civil judges and magistrates exercising judicial functions would be appointed by the President in accordance with the rule made by him after consulting the Public Service Commission and the Supreme Court. Article 116 declared that the control, including the power of posting, promotion, grant of leave, and discipline of the persons employed in the judicial service and magistrates exercising judicial functions vested in the Supreme Court.

The Fourth Amendment increased the power of the executive considerably. Thus under Article 115, there is no requirement for the President to obtain recommendations or consultations. The control under Article 116 is given to the President instead of the Supreme Court. Article 116A was inserted declaring that all judicial officers shall be independent in the exercise of their judicial functions. But it appears to be without any substance in the light of the provisions of Articles 115 and 116.

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[145] MI Farooqui (1996b: 65-68) discussed how the attempts by opposition Members of Parliament failed to restore the original constitutional position regarding consultation.

To a certain extent, the situation was improved by the Second Proclamation Order of 1978.[146] It provided that the President must exercise this power of control under Article 116 'in consultation with the Supreme Court'. This is only a partial restoration since it is not applicable to appointments. This must be read with Article 109 which says that the High Court Division shall have superintendent powers and control over all courts and tribunals subordinate to it.

In spite of the amended provision requiring consultation, this was not generally followed by the executive. As a result, the lower judiciary became an extension of the civil service. Mahmudul Islam observes:

> Consultation with the Supreme Court cannot bring about any change unless a tradition to abide by the opinion of the Supreme Court is developed. Furthermore, the control and discipline of the members of subordinate courts and magistrates exercising judicial functions is not being truly complied with.[147]

The advent of PIL resulted in a number of challenges by the constitutional activists pointing out the failure of the constitutional duty of the executive to seek consultation and abide by it. In Syed Mahbub Ali and others v. Ministry of Law and others[148] a number of sub-ordinate court judges were promoted disregarding the recommendations of the Supreme Court. The challenge failed on the ground of standing. In Md Idrisur Rahman v. Shahiduddin Ahmed and others[149] an advocate claimed that the appointment of the Chief Metropolitan Magistrate

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[146] No. IV of 1978.

[147] Mahmudul Islam (1995: 56).

[148] Above note 57.

[149] Unreported Writ Petition 1381/94.

without prior consultation with the Supreme Court violated Articles 115 and 116. This case was awaiting trial before becoming infractuous.

Some success was achieved in Aftab Uddin (Md) v. Bangladesh[150] where three District judges were promoted as Joint Secretaries in the Ministry of Law. The government contended that there is no tradition to consult with the Supreme court in appointing District judges in the Law Ministry. It was argued that Article 116 applies only when a person is promoted or transferred from one judicial post to another, not when the posts are administrative.[151] But the Court observed that the literal interpretation of Article 116 is in consonance with the spirit and scheme of the Constitution regarding separation of the judiciary from the executive.[152] As a result, the Article was interpreted liberally and it was said:

> So, in our view, Article 116 applies in case of posting and promotion of persons in the judicial service to any post or position outside the judicial service in the same manner as their posting and promotion to any post in the judicial service.[153]

The Court also emphasised that past instances of promotion without consultation cannot cure the unconstitutionality of such acts.

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[150] 48 DLR (1996) 1.

[151] *Ibid.* at 5-6. According to Article 152 of the Constitution, 'judicial service' means a service comprising persons holding judicial posts not being posts superior to that of a district judge. Thus the post of a secretary in the law ministry is not a judicial post.

[152] *Ibid.* at 10-12. The Court refused to follow the Indian case of State of Assam and another v. Kuseswar Saikia and others AIR 1970 SC 1616, because the context, purport and language of Article 116 do not correspond to Article 233 of the Indian Constitution.

[153] Above note 150 at 13.

The achievement of Aftab Uddin is limited because it does not deal with the appointment of subordinate court judges. In that respect, the judiciary has no role at all. Even on questions of posting, promotion etc., there is a long tradition of ignoring the recommendations made by the Supreme Court. It is apparent that the attempts by the constitutional activists are bound to produce limited success, unless the original constitutional provisions are re-instated and the executive is more responsive to established constitutional conventions rather than seeking to create its own.

5.3.2.3 Re-appointment of retired judges: Whether constitutional posts are in the 'service of the Republic'

A very important weapon in the arsenal of the executive is its power to appoint retired judges in constitutional posts. There are two types of PIL cases challenging such appointments. The first type, discussed here, involves the principle that a retired constitutional post-holder is eligible for appointment in another constitutional post because such a post is not a 'service of the Republic'. The second type, discussed in chapter 5.3.2.4 below, deals with the prohibition of Article 99 of the Constitution which restricts the re-appointment of judges.

A constitutional post is one that is created by the Constitution and the Constitution itself determines, either directly or indirectly, the mode of appointment, conditions of employment and retirement.[154] The holders of these

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[154] Constitutional posts include offices of President, Prime Minister, Minister, State Minister, Deputy Minister, Member of Parliament, Speaker and Deputy Speaker of Parliament, Judges of the Supreme Court, Chief Election Commissioner, Election Commissioner, Chairman and Members of the Public

posts perform vital constitutional functions which reflect the power relationship of the three organs of the government. The spirit of the Constitution and the constitutional scheme of separation of powers, already discussed in chapter 5.1, dictate that the balance of power should not be in favour of any particular organ. Thus the Constitution declares various limitations on the appointment of a retired constitutional post-holder into another constitutional post.

However, since the separation of powers in the Bangladesh Constitution is not rigid, the executive enjoys a considerable amount of freedom to make such appointments. In some cases, the constitutional provisions have been amended to enhance this power. Thus in practice, appointments made by the government are sometimes protested by its opponents. Constitutional and political activists, claiming that the principle of separation of powers has been undermined, approach the court through PIL and express concern that the balance of power is tilting too much in favour of the executive.[155]

In a number of PIL cases, it was argued that the new office of the appointee, although a constitutional post, is a 'service of the Republic' and as such the appointment from another constitutional post is invalid. In 1987, the first challenge was made by a political activist in Saiyid Munirul Huda v. AKM Nurul

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Service Commission, Auditor General, Comptroller General and Attorney-General for Bangladesh.

[155] For expressions of this concern, see Shamsul Huq Chowdhury v. Justice Md Abdur Rouf and others above note 144 at 178 and 181; M Saleem Ullah v. Justice Mohammad Abdul Quddus Chowdhury above note 62 at 691-692.

Islam.[156] The appointment of a former Chief Election Commissioner as the Vice-President was questioned.[157] The ground was that, under Article 118(3)(a), a person who has held office as Chief Election Commissioner is disqualified for appointment as a person in the service of the Republic including the post of the Vice-President.

In 1995, a Chief Election Commissioner returned and re-joined as a judge of the Appellate Division.[158] This was challenged in Shamsul Huq Chowdhury v. Justice Md Abdur Rouf and others[159] relying again on Article 118(3)(a). Also mentioned was Article 147(3) which prohibits holding of office of profit by persons mentioned in Article 147(4) including the Chief Election Commissioner. Although not a PIL case, another relevant case is Kazi Abdul Wahab v. Bangladesh[160] where the question was whether the Deputy Attorney General, who is not a constitutional post-holder, is in the service of the Republic.

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[156] 1 BLC (1996) 437. In a comparable case, parliament members in India challanged the election of President Dr Zakir Hossain on the ground of constitutional disability in Baburao Patel v. Dr Zakir Hossain AIR 1968 SC 904.

[157] The appointment was made in 1986 by the President under Article 49 of the Constitution. At that time, the system of government was presidential. After the re-introduction of the parliamentary system by the Constitution (Twelfth Amendment) Act (No. XXVIII of 1991), there is no vice-presidential post in the Constitution at present.

[158] Justice Abdur Rouf took oath as a judge in 1984. He was appointed as the Chief Election Commissioner in 1990. He returned in 1995 and took oath to a new office of the judge of the Appellate Division.

[159] Above note 144.

[160] 31 DLR (1979) 332.

The leading case on the status of the constitutional post holders came in 1996. In Justice Shahabuddin,[161] a former Chief Justice was appointed as the President. This was challenged on the ground that this appointment violated Article 99(1) which prohibits subsequent appointment of any justice in any office in the service of the Republic, including the office of the President. The question in all these cases was whether constitutional posts, including the offices of the President, Vice-President and Supreme Court judges, are to be considered as services of the Republic.

It was argued that the constitutional posts are part and parcel of the government and the holders of these posts discharge functions towards the State.[162] So all the functions of these persons including the President may be construed as rendering services to the Republic.

This argument is too simplistic. Being created by the Constitution, constitutional post holders enjoy a special status for at least two reasons. First, they are not to be controlled directly by the Ministers who might exercise undue control over persons performing important constitutional functions. Second, these posts often combine the functions of more than one governmental department. The Prime Minister, for example, is involved with both legislative and executive functions. Thus treating constitutional post holders alongside with general government officers and civil servants would be unduly restrictive and would hinder smooth operation of the Constitution.

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[161] Above note 26.

[162] *Ibid.* at 490.

It has been observed accordingly that different constitutional provisions apply to persons in the service of the Republic and constitutional post-holders.[163] The definition of 'service of the Republic' given in Article 152(1) must be read with Part IX of the Constitution. Articles 133-141 of this part, under the title 'the services of Bangladesh', declare the rules and methods of appointment, conditions of service and constitutional protection.[164] For relief, complaints must be made to the administrative tribunal under Article 117.

The appointment, conditions of service and removal of constitutional post holders are dealt with separately by various Articles of the Constitution, generally in combination with Article 147.[165] For example, Articles 48-54 together with Article 147 concern appointment, conditions of service and remuneration of the President.[166] By providing two distinct types of provisions, the Constitution clearly indicates that the constitutional post holders have a special status and are

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[163] Saiyid Munirul Huda above note 156 at 437-438, Justice Shahabuddin above note 103 at 490-491 and Shamsul Huq Chowdhury above note 159 at 179-180.

[164] Article 133 says that the parliament and the President by law and rules regulate appointment and conditions of service of the republic. They hold office, says Article 134, upon the pleasure of the President. Art 135 grants constitutional protection as to dismissal or reducal in rank by appointing authority. Provision as to reorganisation is allowed under Article 136. Furthermore, Articles 137-141 provide for a Public Service Commission to conduct tests and examinations to select persons in the service of the Republic.

[165] Article 147(4) includes the President, the Prime Minister or Chief Adviser, the Speaker or Deputy Speaker, Minister, Adviser, Minister of State or Deputy Minister, Judge of the Supreme Court, Comptroller and Auditor-General, Election Commissioner and Member of a public service commission. Vice President was omitted by the Twelfth Amendment.

[166] Similar matters relating to the Supreme Court judges can be found in Articles 94-99 and 147. As regards the Vice-President, the relevant provisions could be found in Articles 49 and 51 before the Twelfth Amendment of the Constitution.

neither 'public officers' nor 'persons in the service of the Republic' within the meaning of these terms as defined in Article 152(1) of the Constitution.

Persons in the service of the Republic are in the permanent cadre service of the government regulated by the Public Service Commission constituted under Article 137.[167] They hold their office, according to Article 134, during the pleasure of the President. Constitutional post holders, on the other hand, hold their office for the period fixed by relevant constitutional provisions.[168] In fact, it appears that the President is the constitutionally controlling authority and makes rules and regulations for appointment and removal of persons in the service of the Republic. It is unlikely that the makers of the Constitution intended to put the elected office of the President on the same footing with the selected government officers.

Both in Saiyid Munirul Huda and Justice Shahabuddin, the petitioners relied on Article 66.[169] Under clause 2(dd), a person is disqualified to be a Member of Parliament if he holds any office of profit in the service of the Republic. Article 66(2A) further says:

> For the purposes of this Article a person shall not be deemed to hold an office of profit in the service of the republic by reason that he is a President, Prime Minister, Ministers, Minister of State or Deputy Minister.

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[167] Justice Shahabuddin above note 103 at 491.

[168] For example, the President is elected for a term of five years under Article 50. A Supreme Court judge, under Article 96, holds office until he attains the age of sixty five years. Government officers also serve until they attain the retiring age. But while the concerned Ministry can remove a government officer, constitutional post-holders can be removed only through the mechanism provided by the Constitution.

[169] Syed Munirul Huda above note 156 at 438 and Justice Shahabuddin above note 103 at 493-496.

It follows that since the persons mentioned are excluded for this specific purpose, they are persons in the service of the Republic in all other cases. Also, since some other constitutional posts are not mentioned, persons holding these posts are in the service of the Republic.

There are several counter-arguments. First, clause (2A) is only a proviso of Article 66 and was inserted for the limited purpose of election of MPs. It does not define the nature of offices of the President or other constitutional post holders for other purposes used in the Constitution. In this sense, it must be read in a limited way and should not go beyond Art 66. Second, the interpretation of this Article historically varied in accordance with the will of the ruling regime.[170] This indicates that the words used in the Article were drafted to serve some purpose of the authorities according to the need of the circumstances. Any interpretation must take this into account and refrain from using the clause as a general rule applicable to the entire Constitution. Third, a general rule of constitutional construction is attracted in this case. The exclusion in clause 2A does not automatically include the posts mentioned there as those in the service

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[170] In the Constitution, in its original form of 1972, a similar provision was contained in Article 66(3). In 1978, by the Second Proclamation (13th Amendment) Order, the Chief Martial Law Administrator was declared a person not in the service of the Republic for any purpose whatsoever. This was followed by the Second Proclamation (15th Amendment) Order, which provided in clause 2A that for the purpose of Article 66, a person shall not be deemed to hold an office of profit in the service of the Republic by reason that he is a Prime Minister, Deputy Prime Minister, Ministers, Minister of State or Deputy Minister. In 1981, the Constitution (Sixth Amendment) Act added the President and Vice President. Subsequently, the Vice President was dropped by the Twelfth Amendment of the Constitution.

of the Republic in all other cases. The inclusion must be inferred from other provisions and from a reading of the Constitution as a whole.

Another very important factor influenced the Bangladeshi Court to differentiate constitutional post-holders from other officers. A similar status has been given to these persons in India and Pakistan. Indian cases have generally relied on certain tests to determine service of the Government.[171] These persons must perform their duties for the government and the government must make their appointment, have right to removal, pay remuneration and control their performance.

Under the Constitution of Pakistan, the definition of 'service of Pakistan' is similar to Bangladesh with the only exception that certain persons including the President, Speaker, Ministers, Supreme Court judges etc. are excluded.[172] Apparently, concludes Md Mozammel Hoque J, constitutional post-holders are not in the 'service of the Government' of India or in the 'service of Pakistan'.[173] So by analogy, constitutional post holders do not come within the purview of the definition of 'the service of the Republic' in Bangladesh.

The cases analysed demonstrate that the Court relied on the interpretation of specific Articles to determine the qualitative difference between constitutional

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[171] Leading Indian cases include Abdus Shukur v. Rikab Chand AIR 1958 SC 52; Guru Gobinda Basu v. Sankari Proshad Ghosal AIR 1964 SC 254; Bhagawati Proshad v. Rajib Gandhi AIR 1986 SC 1534 (MPs not in the service of Government); Union of India v. Sankalch and Nimatal Shoth and another AIR 1977 SC 2328 (High Court judges are not government servants).

[172] Article 260 of the Constitution of Pakistan 1973.

[173] Justice Shahabuddin above note 103 at 493.

posts and services of the Republic. The special nature of these posts has been emphasised with respect to their constitutional functions. While so doing, the judges refused to make any exceptions in cases of appointment of retired persons. A strict application of the principle of separation of powers contained in Article 22 was refused on the ground that it is a non-enforceable Fundamental Principle.[174] The Court was also influenced by the fact that separation of powers is not absolute or rigid in the Bangladesh Constitution.[175] As a result, the appointments in questions were declared valid and the petitioners were unsuccessful in their attempts.

5.3.2.4 Re-appointment of retired judges: Prohibition of Article 99

In the cases so far discussed, the crux of the argument was whether a constitutional post is to be considered as one in the service of the Republic. In some other cases, however, the argument revolved around the scope and extent of the prohibition, declared in Article 99 of the Constitution, regarding subsequent appointment of retired judges.

Article 99 originally provided that a person who has held office as a judge, after his retirement or removal, can not be appointed as a person in the service of the Republic. Back in 1989, it was observed in the 8th Amendment case:

> The purpose of the prohibition was to keep a Judge independent all through his service as a Judge. Opening up of opportunities for

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[174] Shamsul Huq Chowdhury above note 144 at 180.

[175] See above chapter 5.1.

> appointment after retirement may serve as a temptation and tamper with his independence during the concluding period of his service.[176]

Subsequently, however, the Article has been amended and the restriction partially withdrawn. Now an appointment in a judicial or quasi-judicial office is allowed.[177]

Appointment of Supreme Court judges in judicial or quasi-judicial posts is thought to be a necessity for the administration of justice. In fact, creation of Courts and Tribunals outside the general hierarchy of the superior courts is an established practice of modern governments. Bangladeshi judges, after retirement, function as chairmen of Labour Appellate Tribunal, Administrative Tribunal, Court of Settlement and so on.

However, enabling the retired or removed judges to be appointed in judicial or quasi-judicial posts has actually increased the power of the appointing authorities in Bangladesh. The first problem is that although Article 99(1) allows these appointments, it does not declare any procedure of appointment, terms or conditions of office or security of service. To put it briefly, there is no specific constitutional protection for the judges. In the absence of specific provisions, the

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[176] Above note 1 at 151. For similar observations, see Abdul Bari Sarker v. Bangladesh 46 DLR (AD) (1994) 37 at 38.

[177] Martial Law Proclamation Order 12/12/75. Article 99 says:

(1) Except as provided in clause (2), a person who has held office as a Judge otherwise than as an Additional Judge shall not, after his retirement or removal therefrom, plead or act before any court or authority or hold any office of profit in the service of the Republic not being a judicial or quasi-judicial office.

(2) A person who has held office as a Judge of the High Court Division may, after his retirement or removal therefrom, plead or act before the Appellate Division.

Court could in theory resort to general principles including the principles of natural justice.

The second problem comes here - the appointments are made under contracts of employment. The government relies on section 5(3) of the Public Servants Retirement Act[178] which says that the President may employ a public servant on contract after his retirement. As a result, neither the principles of natural justice, nor any statutory provisions can be invoked to ensure relief or security of the service of the employee. Employment contracts tend to be unequal in favour of the executive. The Supreme Court has observed that section 5(3) does not apply in the case of retired judges because they are not public servants or persons in the service of the Republic.[179] But instead of rendering the employment contracts invalid, this only makes them independent of any statutory provisions in relation to their formation.

Thus in Abdul Bari Sarker,[180] it was apparently established that the removal of Justice Abdul Bari from the post of the Chairman of the Court of Settlement was the result of his independent stance against the executive.[181] But

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[178] Act XII of 1974.

[179] Abdul Bari Sarker v. Bangladesh above note 176 at 39.

[180] *Ibid.* at 38.

[181] The High Court Division, in Unreported Writ Petition 95/1993, found that the government's order cancelling the petitioner's appointment was *mala fide.* The petitioner had annoyed the government by deciding unfavourably in 136 out of 217 cases. He even issued a contempt proceeding against the Secretary of the concerned Ministry for non-compliance with the order of the Court. The government's annoyance was reported in national dailies before the cancellation of the appointment.

since his termination did not violate the contract of employment, the action of the government could not be challenged.

This problem is even worse than it first appears because the appointment of a retired judge is made solely by the executive. There is no provision whatsoever that requires any sort of permission, advice or approval from the Supreme Court. So the government, autocratic or democratic, has the freedom to pick the retired judge of its choice.

Another aspect of Article 99(1) is that it applies only after a judge of the Supreme Court ceases to hold office. Thus the Court refused to apply the Article in Justice Quddus Chowdhury[182] because the respondent was a sitting judge of the High Court Division. But this situation raises the question whether it is possible for a person to hold two posts simultaneously.[183]

The petitioners in Saleem Ullah v. Md Abdur Rouf and others[184] and Shamsul Huq Chowdhury[185] claimed that a judge can not at the same time hold the office of the Chief Election Commissioner. In these cases, Justice Abdur Rouf did not draw a salary from both offices but had a lien to return. Apparently, he was given a lien because he might otherwise be unwilling to hold the office of the

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[182] Above note 62 at 692.

[183] Justice Mohammad Abdul Quddus Chowdhury was serving as a joint Secretary in the Law and Parliamentary Affairs Division of the Ministry of Law and Land Reforms. He was appointed as an Additional Judge of the High Court Divion in 17/1/83. Immediately after this appointment, in 1/3/83, he was appointed as Secretary in the same Division of the same Ministry. From an Additional Judge, he was appointed a Judge of the High Court Division on 2/8/84. Apparently, he was holding two posts simultaneously.

[184] Unreported Writ Petition 1087/94 and 48 DLR (1996) 144.

[185] Above note 159.

Chief Election Commissioner, a contractual service providing lesser retirement benefit and protection. The challenges in the two cases were not answered. Shamsul Huq Chowdhury was decided on other grounds and Saleem Ullah v. Md Abdur Rouf and others became infractuous before a judgement could be pronounced.

Determination of quasi-judicial posts as distinct from administrative posts is another controversial issue. In fact, appointment in administrative posts is barred not only by Article 99(1), but also by Article 147(3). The latter says that certain constitutional post-holders, listed in Article 147(4), shall not hold any office, post or position of profit or emolument or take any part whatsoever in the management or conduct of any company, association or body having profit or gain as its object.

The general principle that appointments in administrative posts are invalid has been recognised in Quddus Chowdhury.[186] The same grounds were taken by the petitioner in M Saleem Ullah v. Justice AKM Sadeque.[187] It was claimed that the office of the Chief Election Commissioner is neither judicial nor quasi-judicial and the appointment of Justice AKM Sadeque as the Chief Election Commissioner violated Article 99(1). Before the question could be answered, the case became infractuous. But the claim does not appear to be sustainable. The

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[186] Above note 62 at 692-693.

[187] Unreported Writ Petition 1010/95.

power of the Chief Election Commissioner to decide election disputes under various provisions of law and the Constitution is quasi-judicial in nature.[188]

It may be concluded that the provisions of Article 99 continue to favour the executive. Repeated attempts by the constitutional and political activists to challenge this have failed to bring any substantial change. The Court has neither declared it anti-constitutional nor been able to restrict its scope effectively. Making statutory provisions to ensure security of office is perhaps the most obvious and easy solution. But it was observed in Abdul Bari Sarker that:

> If it is not thought to be expedient to make any statutory provision in the case of such appointment, it is better that the original Article 99 be restored putting total ban on appointment of a retired Judge to any public office whatsoever.[189]

Another recommendation has been made in the 8th Amendment case. Shahabuddin Ahmed J said:

> If this provision for appointment after retirement is retained, its bad effect may be countered if a reasonable period, say two years, elapses from the date of a Judge's retirement to the date of his fresh appointment to any purely judicial office.[190]

So far, there is no indication that these recommendations are being considered by the law-makers.

It may be observed that in general, the attempts to question the validity of appointments of retired judges and constitutional post holders in other constitutional posts have failed. The result has been encouraging in one respect.

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[188] For example: see Article 66(4) of the Constitution and section 5 of the Members of Parliament (Determination of Dispute) Act (No. 1 of 1980) and Article 14(5) of the Representation of the People Order (PO No. 155 of 1972).

[189] Above note at 39.

[190] Above note 176 at 151.

Petitioners with hidden political agenda actually failed to manipulate the Court and the appointments made by the elected government were not rendered invalid. Also, there is little doubt that when judges secure high constitutional posts, including that of the President and the Vice-President, it increases their profile and indirectly increases the prestige of the judiciary. They are seen as competent neutral persons performing important functions.

However, the situation remains unsatisfactory for several reasons. As the law now stands, judges or Chief Election Commissioners about to retire might find it tempting to appease the government in order to secure a post-retirement job. This is violative of the dignity and independence of the judiciary and re-enforces the executive's privileged position. There is also a danger that when the judges accept post-retirement jobs, they indirectly give legitimacy to an otherwise autocratic or unpopular regime. Finally, the number of cases discussed above clearly indicates that post-retirement appointments in constitutional offices indirectly make the judges controversial figures and thus politicise the judiciary.

5.3.3 Judiciary doing the work of the executive: Certain aspects of implementation of PIL decisions

The Supreme Court of Bangladesh acknowledges the established constitutional principle that the court can not intervene in administrative functions or direct the executive to implement its policy.[191] But due to the very nature of PIL, when

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[191] For recent leading cases re-iterating this principle, see Yunus Mia (Md) and others v. The Secretary, Ministry of Public Works and Urban Development 45 DLR (1993) 98 (allocation of plots to displaced persons) and Abul Hashim (Md) v.

frustrated by the indifference of the executive to perform its functions, the petitioners ask the same from the judiciary. So far, we have two cases where the judiciary in Bangladesh has ventured beyond the traditional methods and has declared specific implementation procedures.

In the *suo moto* case of State v. Deputy Commissioner, Satkhira and others,[192] a person detained unlawfully for twelve years was freed and the cases against him were declared illegal and void. The Court also directed the Secretary of the Ministry of Home Affairs to appoint a senior officer to inquire into the matter. The purpose was to ascertain the involvement of the Zila Parishad Chairman and relevant police officers so that appropriate legal steps could be taken against these persons in proportion to their carelessness, negligence and malice.

The Court gave some other directions as well.[193] A copy of the judgement was ordered to be sent to the Prime Minister to inform her of the situation. Another copy went to the Secretary of the Ministry of Law and Justice. He was directed to inform all the subordinate court judges so that there can not be a similar type of miscarriage of justice.

The Court further ordered the Secretary of the Ministry of Home Affairs to direct the Inspector General of Prisons to inquire and ascertain as to whether any other accused or person has been suffering in the same way in any other jail in

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Election Commission of Bangladesh 48 DLR (1996) 490 (delimitation of constituency according to statutory law).

[192] 45 DLR (1993) 643.

[193] *Ibid.* at 650-651.

Bangladesh. If such persons are found, the Court ordered the Ministry to take appropriate legal steps. Finally, the Secretaries of the Ministry of Home and the Ministry of Justice were directed to submit reports within three months. They were told to report the steps that had been taken in pursuance of the Court's directions and the progress upon their action. The Registrar of the Court, upon receiving the reports, was directed to submit them before the Court.

The directions of the Court clearly intended to construct a mechanism to monitor the prisons with regard to innocent detainees. This is nothing new in the exercise of judicial power in PIL in the sub-continent. Yet, apart from the fact that this is the first and only case in Bangladesh, there are certain other elements to note. The government officers helped the Court to reach the decision, there was no obstruction.[194] Even after the judgement, there was no complaint or dissatisfaction on the part of the executive. Apparently, the executive did not feel threatened by this exceptional solitary case. The Court monitored the matter for some time, but did not actually set up any permanent mechanism. Finally, it is interesting to note that there has been no similar subsequent case.

Recently in Dr Mohiuddin Farooque v. Bangladesh, represented by the Secretary, Ministry of Commerce[195] the Court ordered the government to contest a civil suit. The issue in question in the civil suit was whether radio active milk should be sent back from Bangladesh to the exporting country. A problem arose as to the method of testing radioactivity by the Atomic Energy Commission under

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[194] *Id.* The Court observed this co-operation with satisfaction.

[195] 48 DLR (1996) 438.

the Nuclear Safety and Radiation Control Act 1993[196] and the Import Policy Order 1993-1995. There was no specific rule as to the number of samples to be taken for testing, as to the name of the laboratory where test would be conducted or as to whether re-testing is allowed. Confusion arose because the officers of one laboratory tested the milk as radioactive, the officers of another laboratory re-tested it as safe.

The Court directed to collect one sample per container and test the samples in the Radiation Test Laboratory of Chittagong. It was declared that there should be no re-testing and no sample should be sent directly to the Head Office at Dhaka unless sent by the Chittagong branch. The Court directed these methods to be followed till new rules or regulations are framed by the government under the Act of 1993. If this amounts to judicial law making or assumption of responsibility originally belonging to the executive, there is little that is revolutionary. In fact, this type of directions are sometimes given in non-PIL matters.

The two cases discussed above illustrate the current situation relating to the new techniques of implementation of PIL decisions and the expansion of judicial authority in this regard. First, there is no encroachment by the judiciary in the domain of the executive in any real sense. Especially, the orders of the judges in these cases are temporary in nature and no attempt has been made to play the role of the executive. Second, there has been, so far, no direct confrontation with the executive. One reason is that the number of cases is too

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[196] Act XXI of 1993.

small to make the executive feel threatened. Another reason is that these cases deal with concerns of the unlawfully detained persons and consumers rather than challenging any power or privilege of the government. Third, lack of relevant cases demonstrate that there has been very little development in the introduction of new implementation techniques of PIL. This indicates that the activists as well as the judges in Bangladesh are rather conservative in this respect compared to their Indian and Pakistani counterparts.

Chapter 6: Concluding analysis

In this thesis, we have examined and analysed the development of PIL in Bangladesh from a constitutional perspective. The process of recognition of PIL as an integrated feature of the Bangladeshi law has been analysed in order to explore who has been using the techniques of PIL, for what purposes, the extent of their success and who has actually been benefited. The main thesis of our discussion has been that the techniques of PIL have been taken over by the élite to further their own agenda. As a result, the emphasis in Bangladeshi PIL to date has been mainly on the participation of a privileged few in the power-relations debate rather than socio-economic justice for the poor and the deprived.

In chapter 2, certain relevant conceptual issues and the constitutional basis of PIL were analysed. We traced the background of PIL in the USA and other western jurisdictions by outlining the developments of relevant ideas, theories and concepts relating to PIL.[1] In modern societies, traditional litigation often fails to ensure relief where diffuse or community rights of the citizens are involved. PIL is generally seen as an attempt to represent the unrepresented so that the rights of all citizens may be ensured.

In the sub-continent, PIL has been the result of social activism on the part of a dedicated band of volunteers, lawyers and especially judges. In fact, in India,

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[1] See above chapter 2.1.

it has been observed, PIL is to some extent judge-led and judge-induced.[2] Some Indian judges were genuinely concerned about the problems of governmental lawlessness, social and economic deprivation and the failure of the traditional legal procedure to provide adequate relief. They resorted to social activism and validated their arguments through creative interpretation of the Constitution. Especially the status of the non-justiciable Directive Principles of State Policy was emphasised in favour of social justice. A considerable number of PIL cases in India, from the very beginning, dealt with genuine social problems and involved problems of bonded labourers, pavement-dwellers and unlawfully detained helpless individuals.[3] Once recognition was given, encouragement and invitation by the judges resulted in a great number of PIL petitions.

The Pakistani situation resembles the Indian one, where a strong sense of social consciousness fuelled judicial activism.[4] However, the most important distinguishing feature of the Pakistani PIL is its emphasis on Islam. The main reason is that PIL developed in the middle of the process of Islamisation of the laws. While drawing the validity of PIL from the constitutional provisions, which conveys the Islamic character of the Constitution, it was declared that PIL is not

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[2] See above chapter 2.2. For discussion on the respective contributions of different activist judges, see Baxi (1985a: 291) and Ahuja (1996: 277- 284).

[3] Early examples of such cases include: Husssainara Khatoon and others v. Home Secretary, State of Bihar (1980) 1 SCC 81 (detention); Sunil Batra (II) v. Delhi Administration AIR 1980 SC 1579 (detention); Ratlam Municipality v. Vardhi Chand AIR 1980 SC 1622 (contaminated water supply); Bandhua Mukti Morcha v. Union of India AIR 1984 SC 802 (bonded labour) and Olga Tellis v. Bombay Municipal Corporation AIR 1986 SC 180 (pavement-dwellers). Ahuja (1997) provides a comprehensive list of Indian cases.

[4] See above chapter 2.3.

only compatible with the Islamic provisions, but such provisions mandate a PIL approach.[5] As in India, the judges practically invited PIL and the courts soon received a huge number of PIL petitions.[6] Many of these initial cases related to socio-economic issues including problems of bonded labourers, police excesses and unlawfully detained individuals.[7]

In Bangladesh, the socio-economic situation is very much similar to India or Pakistan. But the provisions of the Constitution as well as the constitutional developments are distinct enough for the Bangladeshi judges to have proceeded in a somewhat different direction. Our analysis illustrated that the Constitution of Bangladesh contains social and economic justice provisions comparable to similar provisions in the Indian and Pakistani constitutions.[8]

However, the social justice bias in the Constitution of Bangladesh is less pronounced than it is in India.[9] Also, while PIL was being advanced, the social justice bias in the Indian Constitution was on the increase; in Bangladesh, as a result of a number of constitutional amendments, such bias is on the decline. As

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[5] See Khan (1993: 48-53) for an analysis of the assertion that Islamic principles have played a most important role in the development of PIL in Pakistan.

[6] In the Quetta Conference (1991: 126-152), a formal declaration by the judges invited PIL cases as they constructed a procedural framework for receiving and deciding PIL petitions.

[7] See Khan (1993: 60-91) for a discussion on the initial PIL cases. Examples of such cases include: Darshan Masih alias Rehmatay and others v. The State PLD 1990 SC 513 (bonded labourer); Shahnaz Begum PLD 1971 SC 677 (detention) and The State v. SSP PLD 1991 Lah 224 (suo moto investigation by the Court into oil stove blasts).

[8] See above chapter 2.4.1.

[9] See above chapter 2.4.3.

regards the Islamic provisions in the Bangladeshi Constitution, it must be noted that there is no Islamisation of laws in the Pakistani style.[10] The Constitution started as a secular one and was later amended to contain certain Islamic provisions. But these changes represent a compromise between the ideas of fundamentalist Islam and pure secularism rather than a commitment to any particular ideology.

The result has been an assertion by the Bangladeshi lawyers and judges that, with respect to the Constitution, the Bangladeshi situation is unique and distinct from Indian or Pakistani circumstances.[11] This uniqueness, reflecting the spirit and objectives of the Constitution, is to be gathered from the entire document, especially from the Preamble, Article 7 (supremacy of the Constitution), Part II (Fundamental Principles) and Part III (Fundamental Rights). Accordingly, the basis of legitimacy of a PIL approach will depend on the compatibility of PIL with the constitutional spirit.

In some cases, this constitutional spirit has been interpreted in favour of mandating a social justice approach. Thus in Welfare Association[12] and in the judgement of Latifur Rahman J in FAP 20,[13] the demand of the Constitution to ensure socio-economic justice is seen as the basis that inspires and validates PIL.

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[10] See above chapter 2.4.4.

[11] See above chapters 2.4.5 and 2.4.6.

[12] Bangladesh Retired Government Employees Welfare Association v. Bangladesh (Welfare Association) 46 DLR (1994) 426 at 435.

[13] Dr Mohiuddin Farooque v. Bangladesh (FAP 20) 17 BLD (AD) (1997) 1 at 24.

BB Roy Choudhury J also argues in this line in FAP 20.[14] This social justice approach is very akin to the Indian or Pakistani approach and, in the light of the constitutional provisions, is a sufficiently strong argument for judicial activism.

However, we argue that while interpreting the spirit of the Constitution, the primary focus is often on the notions of constitutional autochthony and people's power rather than on social justice. This line of thinking has been developed over the years by a number of lawyers, activists and judges and ultimately gained its final expression in the recent judgement of Mustafa Kamal J in FAP 20.[15] Apart from the fact that continuous reliance has been placed on this theme by the Bangladeshi judges and lawyers, its importance has been enhanced because Mustafa Kamal J's judgement supporting this notion is the leading judgement of FAP 20.

Accordingly, it is emphasised that the Constitution of Bangladesh is autochthonous in nature and is distinct in this respect from Indian or Pakistani constitutions. It is not only a product of a 'historic war for national independence',[16] its provisions clearly emphasise the supreme place of the people in the constitutional arrangement. Thus, it is the power of the people that looms

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[14] *Ibid.* at 25-26 and 31.

[15] *Ibid.* at 16-19. For earlier developments of the theme, see for example Anwar Hossain Chowdhury v. Bangladesh (8th Amendment case) 1989 BLD (Spl) 1 at 59; Anwar Hossain Khan v. Speaker of Bangladesh Sangsad Bhavan and others (Parliament Boycott) 47 DLR (1995) 42 at 45-46 and Mohiuddin Farooque (1994-1995: 1).

[16] See the Preamble of the Constitution of Bangladesh 1972.

large behind the constitutional horizon and consequently, the interest of the people must take precedence over any individual or special interests.[17]

The themes of autochthony and people's power distinguish the Bangladeshi interpretation from the other sub-continental countries. There is a continuous assertion by the Bangladeshi lawyers and judges as to this uniqueness.[18] It is a matter of pride for the Bangladeshis that the country, and the Constitution, were achieved through a war of liberation involving the general people. Constitutional recognition of the supreme place of the people thus is not merely an ideological declaration, but has its roots in the political and constitutional history of the country as well as in the national psyche. The importance and profound impact of the 1971 liberation movement on the Bangladeshi people can not be overestimated. Bangladesh is still a young nation, surrounded by big and strong neighbours, in the process of building a sense of national identity. Consequently, the gradual structuring of a national jurisprudence is bound to play a leading part in any new legal development.

However, the fact remains that the main focus is on the power of the people, mainly implying the participation of the people in the modalities of power-sharing. Emphasis is not on social or economic justice for the poor and the deprived. To some extent, it may be argued, the people's power approach by Mustafa Kamal J is a clever manoeuvre by a traditionally-oriented judge to avoid pronouncing too strongly on the themes of social justice. Latifur Rahman J's

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[17] Above note 13 at 18.

[18] *id.* See also Mohiuddin Farooque (1994-1995: 1).

social justice approach appears to have been outshone by the more nationalistic themes of autochthony and people's power.

In chapter 3, our analysis included the development of the cases, issues and activities relating to PIL in Bangladesh over the years. The discussion demonstrated that one of the main reasons of the delay of the development of PIL was due to the absence of democracy and constitutionalism during the long periods of martial laws. While the Constitution was either suspended or partially operative, the environment was not conducive for creative constitutional interpretations. The situation began to improve after the fall of the last autocratic regime of General Ershad in 1990.

However, the constitutional developments that followed were not only major and substantial in nature, they were accompanied by serious political developments.[19] This situation influenced the lawyers and the judges and they were, to some extent, pre-occupied with the transition to democracy. Political activists grabbed this opportunity and co-opted the techniques of PIL to claim their own share in the political power struggle. Almost every constitutional development, our discussion demonstrates, was accompanied by litigation brought in the name of the people.

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[19] There are three major recent constitutional amendments. The Constitution (Eleventh Amendment) Act (No. XXIV of 1991) ratified the actions of the caretaker government that followed General Ershad; The Constitution (Twelfth Amendment) Act (No. XXVIII of 1991) re-introduced the parliamentary system of government and The Constitution (Thirteenth Amendment) Act (No. 1 of 1996) provides for a system of interim governments during the times of parliamentary elections.

An examination of the types of cases brought as PIL confirms the claim that socio-economic issues were outnumbered by elitist causes.[20] Of the cases that have been discussed in chapter 3, a surprisingly large number are political in nature - 27 out of a sample of 47. These cases were brought either with political motives or the issues in question were politically controversial at the time of trial. Including M Saleem Ullah's relentless attempts, there are 13 cases where the government was opposed by its political opponents from appointing its chosen people in various constitutional posts.[21] In contrast, merely five consumer and six environmental cases can be found in the list.[22] Less than five cases relate to the poor and helpless situation of the downtrodden and suppressed.[23] Only one *habeas corpus* case broke new ground of PIL and this was not followed by any

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[20] In practice, many public interest applications are pending trial or have become infractuous. One reason is the delay caused by the overwhelming number of cases competing for the Court's attention. But generally this is due to negotiated settlements, necessary steps taken by the government or reluctance of a judge to deal with a controversial issue. The result is the failure to get a favourable pronouncement on PIL in an otherwise good case. It was said in Ghyas Siddique v. Bangladesh 43 DLR (1991) 179 that the Courts are and should be reluctant to decide constitutional points merely as matters of academic importance.

[21] For an analysis of these cases, see above chapter 5.3.2.

[22] Leading consumer cases include Syed Borhan Kabir v. Bangladesh and others (Paracetamol) unreported Writ Petition 701/1993 and Dr Mohiuddin Farooque v. Bangladesh represented by Secretary Ministry of Commerce and others (Danish Milk) 48 DLR (1996) 438. The leading case on environment is FAP 20 above note 13.

[23] The most important of these cases are Rokeya Khatun v. Sub-Divisional Engineer and other (Slum-Dwellers) unreported Writ Petition 1789/1993 and Issa Nibras Farooque and others v. Bangladesh represented by Secretary, Foreign Affairs and other (Child Trafficking) unreported Writ Petition 278/1996.

other cases.[24] This clearly indicates the extent to which the movement of PIL was dominated by the élite.

For further elaboration, we may consider who has actually brought these PIL cases. In a number of instances, petitions were filed by individuals not claiming to represent any particular organisation or association.[25] These efforts were generally random in the sense that they did not systematically pursue further PIL cases subsequently. Lawyers filing petitions of this type include Ahmed Hossain in Women MPs,[26] Shamsul Huq in Shamsul Huq Chowdhury,[27] Anwar Hossain in Parliament Boycott[28] and Kafiluddin in Charmonai Pir.[29] Among non-lawyers, SB Kabir, a journalist in Paracetamol[30] and MA Ripon, a politician in Md Assaduzzaman Ripon[31] also fall in this category. Except for the Paracetamol case, all the other cases relate to issues that were politically significant and

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[24] State v. Deputy Commissioner, Satkhira and others (Nazrul Islam) 45 DLR (1993) 643.

[25] Generally these petitioners did not act for any financial gain. Almost without exception, the activists, young lawyers or organisations filed PIL petitions and approached the senior and established members of the bar for help. The list of senior lawyers involved includes a number of top ranking high-earners of the Bar: Ashrar Hosain, Ishtiaq Ahmed, Kamal Hossain, Khondokar Mahbubuddin, MI Farooque, Amir-ul Islam and others. Sometimes affiliation with one or more voluntary sector organisations led the senior lawyers to represent a petitioner. Amir-ul Islam, for example, fought a number of cases filed by Bangladesh Mohila Parishad, a leading NGO.

[26] Dr Ahmed Hussain v. Bangladesh and others 44 DLR (AD) (1992) 109.

[27] Shamsul Huq Chowdhury v. Justice Md Abdur Rouf 49 DLR (1997) 176.

[28] Above note 15.

[29] Md Kafiluddin v. Maulana Syed Fazlul Karim and another (1994) unreported Dhaka CMM Court, Petition Case No. 1998/1994.

[30] Above note 22.

[31] Md Asaduzzaman Ripon v. The State (1996) unreported Writ Petition 1635/1996.

disputed at the time.

More than half of the cases discussed in chapter 3 were brought by various associations and organisations. The first type of organisations includes those that are formed for the benefit of a particular group or community. Bangladesh Retired Government Employees Welfare Association in the Welfare Association case and the Bangladesh Newspaper Owners Association in Sangbadpatra[32] fall into this category. In both these cases, PIL was used to safeguard the interest of the members, middle-class ex-officers and opulent business magnets. In contrast, a number of organisations formed to benefit the lawyers' community claimed to advocate public causes through PIL. The Young Lawyers Forum, Committee for the Protection of Lawyers Rights and Bangladesh Legal Rights Trust brought consumer cases.[33] But the public interest elements of these cases were not very strong. Also, since advancement of PIL does not fall within the main objects and purposes of these organisations, PIL was not pursued by them seriously or in any subsequent cases.

The second type of associations includes political and pressure groups that aim to promote their own socio-economic or political agenda in the national life. They used PIL frequently and sometimes quite effectively. ADCAB (Association for Democratic and Constitutional Advancement of Bangladesh), represented by

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[32] Bangladesh Sangbadpatra Parishad (BSP) v. The Government of Bangladesh (Sangbadpatra) 12 BLD (AD) (1992) 153.

[33] These include KM Zabir v. Amanullah and others unreported CMM Court, Dhaka Case No. 1097A1/1988 and Bangladesh Ain Odhikar Trust v. Tabani Beverage & others, (Tabani Beverage) (Civil) 2nd Assistant Judge Court, Dhaka, TS 324/1993.

M Saleem Ullah, focused solely on constitutional activism. M Saleem Ullah began to approach the Court in 1989 and has fought eight constitutional cases since.[34] Muslim Millat Party, an obscure political party, was represented by AB Siddiqui who has brought two writs in 1995-96.[35] Similarly, Bishwa Islam Mission, a religious organisation, was represented by ABM Nurul Islam who has brought three cases since 1993.[36] All of these persons are lawyers and, directly or indirectly, political activists.

In the third category are voluntary sector organisations whose object is to promote social and economic justice. Ayesha Khanam[37] was advocated by a leading women's rights organisation, Bangladesh Mohila Parishad. Also in this category is BELA, Bangladesh Environmental Lawyers Association, which is in a unique position. Until recently, it was led by the energetic Dr Mohiuddin Farooque.[38] BELA is not only well-organised, it has better resources through international funding. The first NGO to seriously take test litigation as a method to achieve its aim, it researched these case thoroughly and pursued them

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[34] Most of these cases related to re-appointment of retired judges. See above chapter 5.3.2.

[35] Abu Bakar Siddique v. Justice Shahabuddin Ahmed and others (Justice Shahabuddin) 1 BLC (1996) 483; 17 BLD (1997) 31 and Abu Bakar Siddique v. Sheikh Hasina and others (Hartal) unreported Writ Petition 2057/1995.

[36] Important among these are ABM Nurul Islam v. Government of Bangladesh (Kadiani) unreported Writ Petition 298/1993 and Md Aminul Gani Titu v. Election Commission (Voters' Registration Form) unreported Writ Petition 1154/1995.

[37] Ayesha Khanam and others v. Major Sabbir Ahmed and others 46 DLR (1994) 399.

[38] The sudden demise of Dr Farooque in December 1997 has been a serious setback for the PIL movement in Bangladesh.

relentlessly.

BELA has filed more than ten PIL cases. Most of the cases fought by BELA involves the environment, consumerism and the rights of the deprived and poor. Its successes include Doctor's Strike,[39] Danish Milk[40] and FAP 20. This may be contrasted with the efforts of Mr Saleem Ullah who confined himself to political issues and judicial structure. BELA is also instrumental in the propagation of the idea and concept of PIL through continued publicity, especially within the lawyers' community. Among the activists, Dr Farooque played the leading role and if a single organisation is to be identified for the success of PIL in Bangladesh, it is BELA.

Our analysis demonstrates that, from the very beginning, the movement of PIL has been dominated by lawyers and political activists. Unlike India, there is no example of telegrams or letters by the poor even though there is no legal obstacle. Only in one or two instances have the socially minded individuals come before the court. The attempts by BELA have been the most successful. But even this is a lawyers' organisation and could not resist the temptation to fight cases relating to political issues.[41] Interestingly, legal aid organisations, including the leading legal aid NGO Madaripur Legal Aid Association, did not file any PIL

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[39] Dr Mohiuddin Farooque v. Bangladesh represented by Secretary Ministry of Health and Family Welfare & Others (Doctor's Strike) unreported Writ Petition 1783/1994.

[40] Above note 22.

[41] See Bangladesh Environmental Lawyers Association v. Election Commission & Others (Election Environment) 46 DLR (1994) 235 and Dr Mohiuddin Farooque v. Bangladesh represented by Secretary Ministry of Law, Justice and Parliamentary Affairs (Appointment of Judges) (1996) 48 DLR 433.

case. Neither did the scores of voluntary sector organisations. It is interesting to note that the even though there is no example of foreign organisations attempting to use PIL for their purposes, the Court is already very cautious in this respect. Mustafa Kamal J has cautioned that petitioners serving foreign interests or local components of foreign organisations will not be granted public interest standing.[42] Apparently, this stance threatens to prevent foreign-funded human rights organisations to petition the court. But the success of BELA, which is to a great extent foreign-funded, indicates that the judges are concerned with the merits of the case and the intention of the petitioner and not the source of funding.

Our analysis illustrates that the Bangladeshi developments of PIL have not been facilitated by any grass-root movement for social justice. These facts verify the argument of this thesis that the movement of PIL has been initiated and controlled by the privileged, especially constitutional and political activist lawyers.

The role played by the Bangladeshi judges may also be explored from the discussion produced in chapter 3. In January 1997, the Supreme Court of Bangladesh comprised of only 42 Justices for a country of 120 million people.[43] Only two writ benches operate at any given time.[44] This means that the

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[42] See FAP 20 above note 13 at 19.

[43] There are five Justices in the Appellate Division, the rest are in the High Court Division.

[44] A writ bench consists of two justices. But generally, it is the senior member who determines the character of the bench. The Chief Justice may constitute special benches where a case so demands.

constitutional activists have very limited scope for 'judge shopping'.

In the High Court Division, since 1991, more or less ten justices have dealt with PIL cases.[45] Abdul Jalil J, from 1991 to 1993, refused standing in Syed Mahbub Ali[46] but allowed the petition in Kadiani.[47] Ismailuddin Sarkar dealt with seven PIL cases in 1994 out of which four cases remain undecided. While he refused standing in FAP 20, it was granted in Election Environment.[48] Mahmudur Rahman J, from 1994 to 1996, dealt with six PIL cases. Apart from the three pending cases, he refused standing in MPs Resignation[49] and Appointment of Judges[50] but allowed it in Haiti Troops.[51] Kazi Ebadul Hoque refused standing in MPs Resignation but granted it in Danish Milk. Habibur Rahman Khan J refused the petitioner in Voters' Registration Form[52] but has recently granted standing in Shamsul Huq Chowdhury. Apparently, these judges decided in a conservative way and found it difficult to pronounce favourably on PIL. But numerous exceptions show that they were responding to the changing circumstances. Whenever the *locus standi* of the petitioner was not seriously

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[45] This number includes the judges who gave rulings or delivered judgements and excludes their silent counterparts.

[46] Syed Mahbub Ali and others v. Bangladesh unreported Writ Petition 4036/1992; Later (1993) unreported Appeal Petition 317/1993.

[47] Above note 36.

[48] Above note 41.

[49] Raufique (Md) Hossain v. Speaker, Bangladesh Parliament and others (MPs Resignation) 47 DLR (1995) 361; 15 BLD (1995) 383.

[50] Above note 41.

[51] M Saleem Ullah v. Bangladesh 47 DLR (1995) 218.

[52] Above note 36.

contested, as in Election Environment, Haiti Troops or Kadiani, they granted standing.

In the High Court Division, significant victory for PIL came from a number of different judges. Anwarul Hoque J in Ayesha Khanam, Naimuddin Ahmed J in Welfare Association and Quazi Shafiuddin J in Parliament Boycott boldly advanced the cause of PIL. But these were the only PIL cases that came before them. An exception is MM Hoque J, who had the opportunity to deliver a series of favourable judgements. He *suo moto* decided Nazrul Islam[53] and set another significant precedent in Doctor's strike. Although Hartal[54] was rejected due to its political overtone, standing has recently been granted in Justice Shahabuddin,[55] Child Trafficking[56] and Ziaur Rahman Khan.[57] MM Hoque J is liberal in his interpretation of PIL, but his presence on the writ bench has not been continuous. It is not difficult for the activists to identify a liberal judge but unless such a judge is actually presiding over a writ bench, that knowledge is of little use.

In the Appellate Division, a considerable number of appeals are pending trial or have become infractuous. Judgements were given only in three cases. In 1992, MH Rahman J refused the petition in Women MPs but standing was not discussed. Sangbadpatra is the only example where Mustafa Kamal J of the

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[53] Above note 24.

[54] Above note 35.

[55] Above note 35.

[56] Above note 23.

[57] Ziaur Rahman Khan v. Government of Bangladesh 49 DLR (1997) 491.

Appellate Division refused standing. This was clearly not a PIL case. But the negative impact of the confusion created by Mustafa Kamal J's judgement persisted till 1996.[58] The decision in the appeal of FAP 20 finally established authoritatively the principles of PIL. In this appeal, as we have already seen, the judges were unanimous but on the Chief Justice's request, the leading judgement was delivered by Mustafa Kamal J. He now used this opportunity to shed his conservative image. The judgement claimed that the Supreme Court was never conservative or anti-PIL, it was the lawyers and High Court Division judges who had 'misunderstood' Sangbadpatra.[59]

The discussion so far illustrates that, instead of one or two judges inviting PIL petitions, the development of PIL in Bangladesh Supreme Court has gone through the hands of a number of High Court Division judges all working more or less simultaneously. It was the liberal interpretation of these High Court Division judges, combined with the mounting pressure from the activist petitioners that finally led the Appellate Division to recognise and establish PIL in FAP 20.

This situation may be contrasted with the Indian situation where the

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[58] For a discussion on the indication given in favour of PIL in Sangbadpatra but not detected by the High Court judges, see above chapter 3.4. Mustafa Kamal J (1994: 159-166) gave even clearer approval for PIL in a 1994 lecture. His growing enthusiasm for PIL appears to be the result of relentless pressure from the activists coupled with a greater exposure to the developments of India and Pakistan. He describes (1994: 168-169) the experience gathered in a conference "Law as an instrument of social justice" organised in 1993 by SAARC Law, Pakistan. Although he appreciated the developments, he believed that 'there were some twisting of procedure somewhere to achieve this result'.

[59] Above note 32 at 3, 16 and 27.

pioneer judges, especially justices Krishna Iyer and Bhagwati, were pre-occupied with social justice. They considered themselves as social activists and have often been identified as populist and socialist judges.[60] In Bangladesh, neither the judges consider themselves as socialists, nor have their judgements revealed social activism in any serious manner. There is also no indication of judicial populism.[61] We do not question the social consciousness or commitment of the Bangladeshi judges, but merely point out that there is less emphasis on social activism and the movement of PIL has not been judge-led or judge-induced. The motivation of the judges came not primarily from their commitment to any ideology of social justice, but from their eagerness to modernise and update the domestic law in line with the latest developments elsewhere in the sub-continent.

In chapter 4, we discussed the initial and most important problem of the development of PIL in Bangladesh, the question of *locus standi* of the petitioner. The focus is on the writ jurisdiction of the Supreme Court under Article 102 of the Constitution of Bangladesh. In this respect, as the law has been inherited from the colonial and Pakistani periods, Bangladeshi judges are influenced by English, Indian and Pakistani developments.

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[60] Baxi (1985a: 290) uses the term judicial populism. Bhagwati ((1987: 20-31) declares that the pro-PIL judges were social activists. See above chapter 2.2.1.

[61] While analysing the problems of democracy and authoritarianism in the sub-continent, Ayesha Jalal (1995: 66-121) has identified the populist periods of India, Pakistan and Bangladesh. Accordingly, the Indian populist period was in the late 1970s during the leadership of Indira Gandhi. In Bangladesh, the populist period was from 1971 to 1975, under the leadership of Sheikh Mujibur Rahman. While in India, PIL developed in the immediate aftermath of the populist era, there is no direct connection between the populism of Sheikh Mujibur Rahman and the development of PIL in Bangladesh.

Thus in the very beginning, we briefly outlined the background of the writ jurisdiction, along with the developments of the law of standing, in the English courts.[62] Historically, the laws of *locus standi* were not uniform and varied for different writs. Even for the same writ, the rules were complex and confusing. However, the law has been liberalised and advanced considerably in the direction of simplicity and uniformity, especially during the period of 1977-1981.

In the sub-continent, the English principles were adopted, in the constitutions of India and Pakistan, at a time when the standing rules in English law were conservative.[63] Thus the Indian and Pakistani courts began with a narrow view of standing. We have examined how the courts have gradually adopted a more liberal interpretation and recognised public interest standing in both jurisdictions.

In Bangladesh, Article 102 of the Constitution declares the writ jurisdiction. Since there was no barrier for a petitioner to approach the Court in *habeas corpus* and *quo warranto* cases, no controversy arose.[64] But the writ of *quo warranto* has been used by the political and constitutional activists to question a considerable number of governmental appointments. As regards the writs of *certiorari*, *prohibiton* and *mandamamus,* the PIL petitioners stumbled on a threshold problem of standing.[65]

As a result of the use of traditional standing rules, the term 'person

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[62] See above chapter 4.1.

[63] See above chapter 4.2.

[64] See above chapters 4.5 and 4.6.

[65] See above chapter 4.4.

aggrieved', as contained in Article 102, was very conservatively interpreted and the petitioner required direct personal interest in the subject-matter. Liberalisation of these strict rules was needed when public issues and interests, as opposed to private rights, were concerned. However, the issue of standing is not merely a question of law, but a mixed question of law and fact. Thus whenever the merits of a case are doubtful, the petitioner's standing is on shaky grounds. This rule has been important in relation to the development of public interest standing in Bangladesh.

In Sangbadpatra, when the standing of the petitioners was refused, the Court declared that as the Indian Constitutional provisions are different, Indian developments are not relevant and the traditional meaning of 'person aggrieved' has to be followed which has received a meaning and dimension over the years.[66] This judgement raised such confusions that, for the next few years, a number of PIL cases were rejected on the ground that the Constitution of Bangladesh is incompatible with a more liberal approach of public interest standing rules.[67] The lower courts and the lawyers often overlooked the fact that there was sufficient indication in the judgement that it was not a PIL case and the scope of such a case was not barred.

However, we argue that in Sangbadpatra, the issue of standing was considered as a mixed question of law and fact and as such the Court did not find any reason to grant public interest standing to a group of rich newspaper owners

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[66] Above note 32 at 155.

[67] See above chapter 4.4.2.2.

so that they could reduce the wages of their employees. Even the majority of the subsequent cases where standing was refused, the subject matters did not relate to the problems of the poor or the deprived, but dealt with the interests of the privileged. In Syed Mahbub Ali, the appointment of judges was challenged and in MPs Resignation, *en masse* resignation of parliament members was questioned. There were a number of cases where the rules of standing were liberalised including Welfare Association and Parliament Boycott. But these achieved partial success and did not amount to a full recognition of public interest standing. The situation was finally clarified by FAP 20, a case involving an environmental problem relating to the livelihood of millions of poor and uneducated village people.

Thus the delay in the recognition of standing was not due to any real legal bar, but mainly because the cases brought before the court were not involved with genuine concerns of the people. Since standing is a mixed question of law and fact, these élite-led cases were refused, apparently denying recognition of PIL. Thus the development of public interest standing rules have been actually hampered by the fact that the concerns of the privileged have dominated the PIL movement.

In chapter 5, we analysed the use of PIL by the political and constitutional activists in re-defining the power-relations in light of the extent of judicial power in Bangladesh. Judges and lawyers in Bangladesh attach great importance to the doctrine of 'separation of powers' despite the fact that the Constitution envisages a rather flexible power-separation scheme. Also, the courts refuse to follow the

doctrine of 'political questions' and instead observe the concepts of judicial self-restraint. As guardians of the Constitution, the judges declare themselves to be neutral. But our analysis demonstrates that the actions and judgements of the Court have, form time to time, been influenced by the political nature of the PIL cases.[68] In the light of these observations, we next analysed the effects of PIL cases on the jurisdictional boundaries between the three governmental organs.

As regards judicial review of statutes and the Constitution, challenges through PIL so far have concentrated on political issues.[69] The cases involved questioned the limits of power of the martial law authorities, local elections and the interests of privileged groups.[70] Amendments in the Constitution or statutes were not questioned on the ground of social or economic welfare of the people.

With respect to parliamentary privileges and internal proceedings, however, the petitioners were more successful.[71] Thus the Court, even when denying standing on different grounds, pronounced in favour of the petitioners in MPs Resignation. It was declared that the Court is the ultimate authority to

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[68] See above chapter 5.1.

[69] Chapter 5.2.1.

[70] Sangbadpatra dealt with the interest of the newspaper owners; powers of marital law authorities were challenged in Mujibur Rahman v. Bangladesh 44 DLR (AD) (1992) 111 and Mohammad Giasuddin Bhuiyan v. Bangladesh BCR 1981 AD 80; Ziaur Rahman Khan dealt with local election; Syed Mahbub Ali and M Saleem Ullah v. Justice Mohammad Abdul Quddus Chowdhury 46 DLR (1994) 691 involved appointments of judges. Women MPs related to the rights of the women, but the petitioner wanted to abolish their reserved seats in the parliament.

[71] See above chapter 5.2.2.

decide what are or are not parliamentary privileges and in cases of violation of the Constitution, the judiciary can intervene.[72]

In relation to the executive, one of the relevant issues is the problem relating to the definition of the 'state' and other associated terms. We analysed to what extent the judiciary has extended this definition so that it can exert more control, through writs, over social and economic functions of the government.[73] Our analysis demonstrates that the basic constitutional and legal provisions are quite liberal. However, compared to India, the judges are conservative in Bangladesh in this respect. As a result, there is further scope to widen the areas amenable to writ jurisdiction through PIL cases.

We also discussed various aspects of implementation of PIL judgements in Bangladesh to explore the extent to which the judiciary is encroaching upon the province of the executive.[74] Our discussion demonstrates that there are only two cases, Danish Milk and Nazrul Islam, involving progressive implementation procedures. There are no legal restrictions, but the development of new techniques of implementation of PIL judgements has been very limited mainly due to a lack of cases and the conservative stance of the judges.

A considerable number of PIL cases involved the issue of judicial independence and dealt with the problems of appointment, tenure and retirement

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[72] First Constitutional Reference (MPs Reference) 1995 (III) (Special issue) BLT (HCD) 159; 47 DLR (AD) (1995) 111.

[73] See above chapter 5.3.1.

[74] See above chapter 5.3.3.

of judges, including their re-appointment after retirement.[75] A demand to appoint judges in the vacant posts of the Supreme Court failed on the ground of standing.[76] As to the consultation relating to the appointment of Supreme Court judges, the position is somewhat unclear. An amendment of the Constitution has removed the provision obliging the executive to ensure such consultation.[77] However, the opinion of the constitutional activists is that there is still a constitutional convention to consult. Through united pressure, the government has been made obliged to follow the convention. But Shamsul Huq Chowdhury demonstrates that the government is still trying to ignore the obligation to consult and thus there is still tension with respect to this issue.

As regards consultation involving sub-ordinate court judges, there has been only partial success. Although a number of PIL cases dealt with this issue, the rigid constitutional provisions, coupled with the unwillingness of he executive to relinquish the power it traditionally enjoys, prevents any liberalisation.[78] Even after the partial success in Aftab Uddin,[79] according to which the executive must consult the judiciary with respect to posting and promotion of judges, the government in practice is ignoring its duty to consult.

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[75] See above chapter 5.3.2.

[76] Appointment of Judges above note 41.

[77] Article 95(1) has been amendment by the Constitution (Fourth Amendment) Act (No. II of 1975).

[78] See above chapter 5.3.2.2.

[79] Aftab Uddin (Md) v. Bangladesh 48 DLR (1996) 1.

Another focus for the PIL petitioners has been the problems relating to the appointment of retired constitutional post holders, including judges, in other constitutional posts. Political and constitutional activists have attempted through a considerable number of cases to challenge such appointments. Appointments of the President, Vice-President, Supreme Court judges, Chief Election Commission etc. have been questioned on the ground that the power-separation scheme have been violated.[80] In many cases, the hidden agenda was to oppose the appointment of a person chosen by the party in power.

These cases have failed in general. The Court declared that constitutional posts are not in the service of the Republic and as such these re-appointments were valid. Similarly, provisions of various Articles allowing re-appointment of judges were construed in favour of the government. As a result, the petitioners have actually failed to use the courts to prevent controversial appointments. The judges remain vulnerable to temptations of future appointments and thus their neutrality is at stake.

It appears that the considerable number of cases by the political and constitutional activists that aimed to re-define the arrangement of power have achieved very limited success. It may be argued that rather than ensuring success, the political activists often aimed to raise the profile of the issue in question, if not their own profile. In any case, there have been several effects of these attempts.

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[80] Leading cases include Justice Shahabuddin, Shamsul Huq Chowdhury, and Saiyid Munirul Huda v. AKM Nurul Islam 1 BLC (1996) 437.

First, these cases often related to highly controversial issues that were being debated in the political arena at the time. Raising these issues in the judicial arena helped to politicise the judiciary. In fact, certain cases related to re-appointment of judges in important constitutional posts indirectly made the judges controversial figures.[81] Second, these PIL cases have achieved very limited success in the advancement of political or democratic rights and the tensions between the executive and the other two organs have not been alleviated. Adjustment of the power-relations scheme through judicial intervention alone is bound to be counterproductive unless there are political will and favourable circumstances. Third, as to the extent to which success has been achieved, the real beneficiary is not the people, but the privileged few representing the interests of the élite.

Development of PIL in Bangladesh is undoubtedly one of the most significant legal developments in recent years. The term 'public interest' itself gives rise to the assumption that PIL cases are initiated, advocated and implemented for the interest of the people. Although the term people include anyone and everyone, in the socio-economic context of Bangladesh, it is the majority of the public, poor, deprived and unrepresented, who are the 'real people'. The present thesis attempted to ascertain to what extent public interest litigation actually has worked as litigation of the people.

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[81] See especially the discussion relating to several cases involving justice Abdur Rouf in chapter 3.8.

Our analysis demonstrates that in terms of emphasis on the constitutional basis, the focus is on the power-relations game rather than on social justice. In practice, this game is being played between different sections of the élite and the general people are not the beneficiary. PIL petitioners are mainly lawyers representing the élite of the society and concerned about their own place and share in the constitutional arrangement. Thus the majority of the PIL cases so far dealt with special/political interest of the élite. This was not levelled off by social activism or populism of the judges. No grass-root movement facilitated the development of PIL. Since cases filed as PIL were often concerned with the problems of the privileged, the courts were reluctant to grant standing or relief. This in turn was often seen as failure to recognise PIL by the Bangladeshi courts. In fact, this use of PIL to participate in the power-relations debate has diminished the potential power of PIL to sway the minds of the judges and lawyers in favour of social and economic justice. Attempts by political and constitutional activists to use PIL to re-adjust power arrangement have achieved limited success. There has been very limited real benefit for the general people.

PIL undoubtedly reflect the political role of the judges, especially as it enables the public to take part in the decision making process of the government and relates to socio-economic and political issues. However, in the development of PIL in Bangladesh, the political role of the courts has mainly been employed to decide power-relations disputes concerning different sections of the élite rather than to enhance the position and power of the 'common man'. The argument that PIL is essentially initiated and controlled by the élite and responsive to their

sense of priorities has often been made with respect to India and other jurisdictions.[82] Yet in India, there has been a large number of cases involving socio-economic issues and the activist judges emphasised on the problems of the poor and the deprived. Recently, Ahuja has argued that the initial agenda in India was to introduce social justice considerations of poverty and inequality into the courts that was later replaced, to a considerable extent, by the cases involving political and other interests of the élite.[83] In Bangladesh, our analysis illustrates, the development of PIL has been dominated, from the very beginning, by the élite and there was neither an initial period of social activism nor a substantial number of pioneering cases involving socio-economic issues. It appears that the Bangladeshi PIL cases do not reflect a stage of judicial social activism and from the very beginning, the situation in Bangladesh resembled the latter stage of Indian development where PIL has become an establishment strategy.

Even after the full recognition of PIL in FAP 20, the effects of the factors discussed above dominate the scene. After more than a year of the authoritative judgement of FAP 20, the number of cases filed and reported remains very limited.[84] While in India and Pakistan, the authoritative interpretations of PIL in

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[82] In the Indian context, see Singh (1986: 336-347). See also Galanter's observation in Shetret (1992: 3).

[83] See Ahuja (1996: 330-347) who reached her conclusion after analysing in detail a huge number of Indian decisions. She observed (*Ibid.* at 338) that emphasis on using law for political struggle has been ultimately disappointing, and, in some instances, may have postponed mobilisation at the grassroots level.

[84] See above chapter 3.9. Only two major cases have been reported since FAP 20, Ziaur Rahman Khan and Danish Milk.

leading cases were followed by a flood of petitions, the situation remains markedly calm in Bangladesh.

Similarly, the development of PIL has so far failed to initiate or influence a liberal programme of law making.[85] A number of statutes relating to public interest matters have come into force in the last few years. The most important is the Environment (Pollution Control) Act.[86] This statute fulfils the long-standing demands relating to environmental problems and creates a directorate of pollution control. However, as to the adjudication of offences under the Act, section 17 states that no court shall accept any complaint under the Act unless a written petition is made by a person authorised by the director of pollution control. This section actually represents a traditional saver clause and restricts the rights of the citizens to directly participate in the compliance procedure. Similar standard clauses can be found in section 8(1) of the Nuclear Safety and Radiation (Control) Act[87] and section 51 of the Sewerage Authority Act.[88]

These developments confirm our argument that the use of the techniques of PIL by the élite to participate in the power-relations debate has actually undermined the much-needed focus on social and economic justice for the poor

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[85] In India, PIL movement has influenced wider standing rules in a number of existing and new statutes where concerned citizens, consumers etc., with *bona fide* intent, can file complaints. See for example, the Child Labour (Prohibition and Regulation) Act 1986, section 16(1); the Consumer (Protection) Act 1986, section 2(1) and the Environment (Protection) Act 1986, section 19.

[86] No. I of 1995.

[87] No. 21 of 1993.

[88] No. VI of 1996.

and the deprived, and hindered the opening up of the field for the active involvement of the general public.

The future of PIL, however, is not entirely bleak. Whatever may be the present situation, the recognition of the principles of PIL and public interest standing in FAP 20 is quite liberal and wide. So the problem, if any, is not a real or imagined legal bar, but lack of willingness to use the techniques of PIL for socio-economic justice.

It appears unlikely that there will suddenly be a torrent of PIL cases in the near future. But as the techniques of PIL have come to stay, further progress is almost certain. First, test cases will continue opening up new grounds for PIL. At the moment, a number of public interest cases relating to the environment, consumer protection and women's right, pursued by BELA and BLAST (Bangladesh Legal Aid and Services Trust), are waiting to be brought before the Court.[89] Second, the government has recently established a Law Commission.[90] This is the first permanent Law Commission in the history of Bangladesh and is headed by Justice Naimuddin Ahmed, an active supporter of PIL. There is thus reason to hope that the activities of the Law Commission will positively influence the development of PIL. Third, there has been some attempts by various voluntary sector organisations to co-ordinate their efforts and share

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[89] At the moment, BELA has more than 20 such matters under consideration. BLAST is also considering a number of future cases through its PIL-cell.

[90] This has been done under the Law Commission Act (No. XIX of 1996).

experiences.[91] This is an indication that the movement for PIL is gradually moving towards maturity.

The legitimacy and respectability of PIL is dependent on its use for genuine social and economic justice purposes for the public. In Bangladesh initial shortcomings and problems have been sorted out to a great extent since PIL has been recognised as an integral part of the legal system. The stage has been set - the demand of the time now is litigation for the people, not in the name of the people.

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[91] This has recently been stressed by the participants in the National Workshop on PIL, held in Dhaka on July 26-27, 1996 titled 'Public interest litigation: Sharing experiences and initiatives'.

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